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Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

LAUREN H. KANE, et al.,

Petitioners,

v.

U HAUL INTL INC., et al.

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

As the Court of Appeals for the Third Circuit properly stated, there is no precedence as to whether exculpatory clauses in self-storage contracts are void since they are against public policy or are adhesive.

The Petitioners suggest that such clauses are unenforceable since a claimant has no notice that there is, in effect, no liability as to damages upon execution of the contract. Such a lack of notice is a violation of due process and against public policy.

Given the popularity of self-storage facilities, owners of such facilities must be held accountable for the lack of maintenance which causes damages to its customers. A blanket waiver or limit of liability for damage caused by known defects must be strictly construed.

Moreover, the lower courts misapplied Fed.R.Civ.P. 68, and dismissed a count when no formal offer under this Rule was ever made to the court. By misapplying the rule, the Petitioners' constitutional rights were violated since subject matter jurisdiction was suddenly swiped away on all counts even though the merits against one defendant were never addressed. Additionally, the lower courts were not authorized to issue a jurisdictional partial dismissal on the merits, when it was improperly alleged that there was no subject matter jurisdiction.

Therefore, since this was a case of first impression to the Third Circuit and has not been determined by other circuits, given the public urgency and importance of such clauses, this Honorable Court must determine their enforceability. Also, the enforceability of Rule 68 must be highly scrutinized in order to avoid violations of constitutional rights.

A. WHETHER THE PETITIONERS' CONSTITUTIONAL RIGHTS TO A JURY TRIAL AND NOTICE WERE VIOLATED SINCE THEY DID NOT RECEIVE PROPER NOTICE AS TO THE EXCULPATORY CLAUSE AND ITS EFFECT TO REMOVE LIABILITY IN A SELF-STORAGE FACILITY CONTRACT THAT COULD NOT BE NEGOTIATED OR BARGAINED?

B. WHETHER THE PETITIONERS' CONSTITUTIONAL RIGHTS WERE VIOLATED WHEN THE LOWER COURTS MISAPPLIED FED.R.CIV.P. 68.?

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The decision of the United States District Court for the District of New Jersey dated March 30, 2004 is set forth in the Appendix D (18a).

The opinion of the United States Court of Appeals for the Third Circuit dated February 7, 2007 is set forth in the Appendix B (4a).

This Writ is timely filed.

STATEMENT OF THE BASIS OF JURISDICTION OF THE SUPREME COURT

The statutory provision for this Court's jurisdiction is 28 U.S.C. Section 1254. The United States Court of Appeals for the Third Circuit issued its final decision on February 7, 2007. This Petition was timely filed.

CONSTITUTIONAL, STATUTORY AND ORDINANCE PROVISIONS INVOLVED IN THIS CASE

Seventh Amendment, United States Constitution:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and not fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of common law.

Fourteenth Amendment, United States Constitution:

> The Due Process Clause of the Fourteenth Amendment provides that no State "shall ... deprive any person of life, liberty, or property, without due process of law...."

STATEMENT OF THE CASE

Procedural History

On December 21, 2001, the Petitioners, Lauren Kane and Martin Feierstein, (hereinafter referred to as the "Petitioners") filed a complaint in the United States District Court for the District of New Jersey against U-Haul International Inc., U Haul Storage Inc., Three Sac Self Storage, Republic Western Insurance Company, Gab Robins North America, Inc., Corporations, Donald Cesaretti, Vicki Cesareti, John Doe, Inc. (which included the unknown contractors), (hereinafter collectively referred to as the "Appellees") for damages sustained to their personal property that was stored under contract in a self-storage facility.

On June 24, 2004, the Appellees filed a Motion for Summary Judgment. On June 25, 2003, the Petitioners filed a Motion for Summary Judgment as well.

On March 30, 2004, the District Court granted the Appellees' summary judgment on most counts and denied the Petitioners' motion. The District Court left open part of Count III, Petitioner Kane's breach of contract claim, against Defendant, Republic Western Insurance Company, for nonpayment of insurance proceeds. The District Court did not make any ruling on Count VIII-Breach of Contract. In fact, it did not even address it.

On July 31, 2004, the Petitioners filed a Motion for Reconsideration. On August 3, 2004, Republic Western Insurance Company filed a cross-motion for reconsideration. On

August 18, 2004, the District Court entered an order denying both motions.

On October 14, 2005, the District Court dismissed the remaining claim of Petitioner Kane against Republic Western Insurance Company for lack of subject matter jurisdiction.

On November 10, 2005, the Petitioners filed a Notice of Appeal to the Third Circuit Court of Appeals. On February 7, 2007, the Third Circuit affirmed the District Court's opinion.

Now, the Petitioners seek relief by timely filing the Petition for Writ for Certiorari.

Facts

At all times material to these proceedings, U-Haul International, Inc. and U-Haul of Southern New Jersey, Inc. owned and operated a U-Haul Self Storage Facility on Highway 130 and Hylton Road, Pennsauken, New Jersey (the "Facility"). The facility was a five story building containing interior storage spaces. They advertised the facility as being "Climate Controlled" and as offering "Inside Storage: Twice the Protection and Security," "Electronically Controlled Access," "Fire Protected: Sprinklers and Alarms," "Live-in Resident Manager," "Video Surveillance," and "24 Hour Security."

On November 10, 1997, Petitioner Martin Feierstein signed a "Rental Agreement," pursuant to which he stored items of personalty in the facility. The pre-printed written

contract contained the following language under the words "Caution":

> Customer bears entire risk of loss or damage to any property stored, including but not limited to loss or damages resulting from the negligence of U-Haul.

Under the words "SAFESTOR PROTECTION" in the contract, the following language is found:

> Customer understands that this self-storage facility:
>
> 1. Is not responsible for loss to customer's property.
>
> 2. Requires that customers provide their own insurance coverage or be "self-insured" (personally assume all responsibility for loss).

A customer had the option to purchase insurance through the owner and assume liability. Petitioner Feierstein did not check either box with regard to the election of insurance nor did he assume any liability. The back of the "Rental Agreement" also claimed that U-Haul was not a bailee and did not accept control, custody or responsibility for the care of property. It also contained language warning any customer not to store property in excess of $15,000.00 value.

On July 14, 1998, Petitioner Kane signed a similar "Rental Agreement", except there was stronger language to purchase insurance, and she did so.

Unbeknownst to either of the Petitioners, the roof on the facility began to leak in 2000. The U-Haul management was

aware of the roof issues and direct damage caused therefrom to Petitioners' property. However, it failed to contact the Petitioners.

Sometime in April 2001, the Petitioners went to the U-Haul facility and were advised that heavy rains in March 2001 had caused flooding in the building.

Petitioners, Kane and Feierstein, made a claim for damage for $120,000.00 to the insurer, Republic Western Insurance Company. Initially, Petitioner Kane received a check for $500.00 from Republic Western. However, it failed to ever take a proper inventory of the items damaged, even though it was given multiple inspections from two adjusters. Almost two years later, the insurer provided its appraisal of damage in the amount of $3,367.96.

As a result of the Appellees' failure to reimburse the Petitioners for damage to their personal property caused bythe lack of proper maintenance and repair of the storage facility, the Petitioners were forced to file a complaint in the United States District Court for the District of New Jersey against them.

ARGUMENT IN SUPPORT OF WRIT FOR CERTIORARI

I. THE PETITIONERS' CONSTITUTIONAL RIGHTS TO A JURY TRIAL AND NOTICE WERE VIOLATED SINCE THEY DID NOT RECEIVE PROPER NOTICE THAT THE EXCULPATORY CLAUSE WOULD IN EFFECT, REMOVE LIABILITY IN A SELF-STORAGE FACILITY CONTRACT THAT COULD NOT BE NEGOTIATED OR BARGAINED.

Contrary to the Third Circuit's opinion that this case does not involve public policy, the Petitioners suggest that this case pits two competing public policy doctrines against each other: holding parties responsible for their actions by limiting their ability to absolve themselves from liability for their own negligence versus recognizing the liberty to contract. The courts below failed to extend this Honorable Court's holding *of Bisso v. Inland Waterways Corp.*, 349 U.S. 85, 75 S.Ct. 629 (1955) to self storage facilities.

In *Bisso*, this Court held that an exculpatory clause in a towage contract violated public policy. *See* 349 U.S. 85, 90-91, 75 S.Ct. 629, 99 L.Ed. 911 (1955). The *Bisso* Court explained, "This rule [that release-from-negligence clauses in towage contracts are unenforceable] is merely a particular application to the towage business of a general rule long used by courts and legislatures to prevent enforcement of release-from-negligence contracts in many relationships such as bailors and bailees, employers and employees, public ser-

vice companies and their customers." *Bisso,* 349 U.S. at 90-91, 75 S.Ct. 629. The purpose of the rule in towage contracts is two-fold: "(1) to discourage negligence by making wrongdoers pay damages, and (2) to protect those in need of goods or services from being overreached by others who have power to drive hard bargains." *Id.* at 91, 75 S.Ct. 629.

The limitation of liability clause has been upheld in several other areas, besides maritime law. In *Steven v. Fidelity & Casualty Co. of New York,* 58 Cal.2d 862, 883, 27 Cal.Rptr. 172, 186, 377 P.2d 284, 298 (1962), the court refused to enforce a limitation on liability in an insurance policy because the insured "must purchase the policy before he even knows its provisions." The Steven court analyzed that the average passenger would accept the risk of having to file suit in Florida in the event of an injury, rather than canceling--without a refund--a planned vacation at the last minute. "The fact that the cruise line can reduce its litigation costs, and therefore its liability insurance premiums, by forcing this choice on its passengers does not, in my opinion, suffice to render the provision reasonable. Even if passengers received prominent notice of the forum-selection clause before they committed the cost of the cruise, the clause was unenforceable." *Id.*

Since this is a case of first impression before this Honorable Court and given the popularity of self-storage facilities and the disparity among the jurisdictions as to the enforceability of limitation clauses, this Honorable Court must grant this Writ and determine whether the exculpatory clause is enforceable. Exemptions limiting or voiding liability for storage facilities from responsibility for their own negligence

or that of their servants are both unjust and unreasonable and conflict with public policy.

The Appellees cannot completely absolve themselves of liability for ordinary negligence. *Bisso, supra*; *La Esperanza de P.R., Inc. v. Perez Y Cia de P.R., Inc.*, 124 F.3d 10 (1st Cir.1997). *Bisso* could be read as laying down a flat rule, applicable to all cases, forbidding clauses that entirely exculpate a party for its own simple negligence. The Court also cited case law forbidding exculpatory clauses in common law relationships where unequal bargaining power is presumed (e.g., utilities and their customers). 349 U.S. at 90-91, 75 S.Ct. 629. Thus *Bisso* can easily be read as limited to relationships where unequal power is inherent or established.

In the self-storage facilities arena, contrary to the lower courts' opinions, there is unequal bargaining power. The Petitioners were forced to sign a standardized rental agreement. The option to purchase insurance should not relieve the Appellees from liability. Furthermore, there is a public duty to perform since the Appellees, and more specifically, the owners of the U-Haul facility, had to maintain a safe environment and meet proper building codes in order to fulfill their duties under the agreement. The lower courts improperly focused solely upon the Petitioners' responsibilities.

The Petitioners acknowledge that agreements to waive claims for mere negligence are generally enforceable at common law. *See* Keeton et al., *Prosser & Keeton on Torts* § 68, at 482-83 (5th ed.1984). However, in our facts, there was not mere negligence but a known roof issue that existed for an extended period of time and Appellees understood it

would inevitably cause damage. Appellees' behavior extended beyond mere negligence. In fact, in its opinion the Third Circuit Court of Appeals acknowledged that their behavior could be considered grossly negligent. Thus, they should be barred from exempting liability due to adhesion contracts and exculpatory clauses. Qualifications exist--the relevant doctrines are unconscionability and contracts of adhesion--turning on factors like adequate disclosure, relative bargaining power and the like. 1-2 Farnsworth, *Farnsworth on Contracts* §§ 4.26, 4.28, 5.2 (3d ed.2004). Self storage facilities must be prevented from denying responsibility in all circumstances. There is no doubt that the clause as written is vastly overbroad and against public policy insofar as it purports to absolve the Appellees of liability for gross negligence, recklessness and intentional wrongdoing. A question remains whether a court should be willing to narrow the clause and apply it only to the extent that it excludes liability for simple negligence. Restatement (Second) of Contracts § 184 provides that a court *may* treat only part of a term as unenforceable ... if the party who seeks to enforce the term obtained it in good faith and in accordance with *reasonable standards of fair dealing.* Boilerplate, even in contracts of adhesion is not automatically unlawful; but it is a relevant consideration in deciding whether to rescue the contract from overbreadth. *See, e.g.,* Richards v. Richards, 181 Wis.2d 1007, 513 N.W.2d 118, 123 (1994); Restatement (Second) Contracts § 184 cmt. b.

The Petitioners suggest that the complete absolution from liability in the exculpatory clauses must be held against public policy in our facts. The lower courts did not see the ne-

cessity of imposing a standard for the commercial setting. However, the Appellees are in the commercial business and must be held to a higher standard.

Exculpatory clauses are not favored. *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960); *Kuzmiak v. Brookchester, Inc.*, 33 N.J. Super. 575, 580, 111 A.2d 425, 427 (App. Div. 1955). Of course, a reasonable person could not bargain for the terms of the facility based upon the boilerplate language contained the storage contracts. Also, a reasonable person would not place valuable personal property in a self-storage facility if they knew that there were a lack of care and proper maintenance of the facility. The Petitioners as well as a reasonable person would not voluntarily, intelligently and with the full knowledge of legal consequences agree to place valuable personal property in a facility that lacked the essentials of keeping the property safe. *Knorr v. Smeal*, 178 N.J. 169, 177, 836 A.2d 794, 798 (2003).

The self-storage contracts are contracts of adhesion, which even the Supreme Court of New Jersey has defined as a contract "that is presented on a take-it-or-leave-it basis, commonly in a standardized printed form, without opportunity for the 'adhering' party to negotiate except perhaps on a few particulars." *Rudbart v. North Jersey District Water Supply Commission*, 127 N.J. 344; 605 A.2d 681 (1992). The New Jersey courts have not hesitated to strike limited liability clauses that are unconscionable or in violation of public policy. *Lucier v. Williams*, 366 N.J. Super. 485, 841 A.2d 907 (App. Div. 2004) *Moreira Constr. Co., Inc. v. Moretrench*

Corp., 97 N.J. Super. 391, 394, 235 A.2d 211, 212 (App.Div.1967), aff'd, 51 N.J. 405, 241 A.2d 236 (1968).

The self-storage facilities should be held to a higher standard. Any contract that would purport to exculpate one from negligence must so state with clarity and specificity. However, willful and wanton behavior, such as in our facts, of the lack of repair of a known damaged roof causing extensive damages, cannot result in the denial of liability. See *Swiss-craft Novelty v. Alad Realty*, 113 N.J. Super. 416, 274 A.2d 59 (App. Div. 1970) (It must appear that the defendant with knowledge of existing conditions, and conscious from such knowledge that injury will probably or likely result from his conduct, and with reckless disregard to the consequences, consciously and intentionally does some wrongful act or omits to discharge some duty which produces the injurious result.)

U-Haul's stated procedure in the event of a leak would be to notify the affected customers so that they could minimize damages. U-Haul failed to follow its procedures. U-Haul did nothing although Petitioner Feierstein's unit was immediately below the leak and, therefore, first affected by it. At some point it did place an orange tarp over the his unit but never advised him of this act, of the leak or that it was soliciting roofing bids. Furthermore, it never advised Petitioner Kane of the leak, even though her unit was on the fourth floor, (one floor removed from the leak), and her unit also sustained extensive water damage.

Since this case was one determined on summary judgment and there were disputed material facts, at a minimum, this

case should have been determined by a trier of fact. Fed.R.Civ.P. 56. The issues of willful and wanton behavior, notice, and mitigation of damages should have been presented to a jury.

In New Jersey, the Petitioners' position of voiding exculpatory clauses is widespread. *Borough v. Hidden Valley*, 312 N.J. Super. 139, 156, 711 A.2d 328, 391 (App. Div. 1998) (A release on a lift ticket could not discharge the defendants of their statutory duties and "should have had no role whatsoever in the trial."); *McCarthy v. Nat. Ass'n for Stock Car Auto Racing, Inc.*, 87 N.J. Super. 442, 449-50, 209 A.2d 668, 673 (Law Div. 1965), aff'd, 90 N.J. Super. 574, 218 A.2d 871 (App. Div.), certif. granted, 47 N.J. 421, 221 A.2d 221 (1966), aff'd, 48 N.J. 539, 226 A.2d 713 (1967) (A release in NASCAR's favor was void because it had a "positive duty" imposed by New Jersey's statutory law to inspect plaintiff's vehicle); *Hy-Grade Oil Co. v. New Jersey Bank*, 138 N.J. Super. 112, 350 A.2d 279 (App. Div. 1975) (The extensive statutory regulations covering every phase of the banking business demonstrate that banks perform an important and necessary public service. A bank cannot, by contract, exculpate itself from liability or responsibility for negligence in the performance of those regulated functions.); *Jasphy v. Osinsky*, 364 N.J. Super. 13, 834 A.2d 426 (App. Div. 2003)(in facts involving damage to a fur while in storage and a limit of liability clause, the court held that in a bailment setting, an exculpatory clause written on the back of an agreement is unenforceable because of the lack of negotiation and the "take it or leave it" form of contract.); *Kuzmiak v. Brookchester, Inc.*, 33 N.J. Super. 575, 588, 111 A.2d 425, 432

(1955) (the Appellate Division struck an exculpatory provision in a lease because of the unequal bargaining position of the parties.)

Given the state law in New Jersey coupled with the impossibility of negotiating the terms of the Agreement, these types of contracts must be highly scrutinized. There is no bargaining power, rather a take it or leave it approach. But by having such a denial of liability, the Appellees, as well as other self-storage facilities, are not maintained, controlled or regulated to uphold the terms of their contracts – to keep a safe, free of known defects, and secure facility.

In order to escape from setting precedence, the lower courts did not look at the genuine disputed facts of bargaining positions, elements of negligence, and willful and intentional conduct. It is sufficient to suggest that the Appellees' acts were intentional since they knew of the extensive roof defects and only provided improper patchwork when they knew that valuable goods were located in their facility.

It appears that exculpatory clauses are standard provisions in consumer self-storage contracts and are not subject to any negotiation. However, whether the consumer can actually negotiate the terms or whether he or she appreciates the impact of the denial of liability becomes another constitutional issue. Whether a consumer has, in fact, actual notice of the denial of liability by a storage facility in an adhesive contract is a due process issue.

To deny the Petitioners the opportunity to present their case on the merits, was a denial of their due process rights, given the lack of notice regarding the extent of the absolu-

tion of liability[1] in an adhesive contract with an exculpatory clause. Such a lack of notice should not be sustained in a commercial setting.

Substantial evidence supports the Petitioners' allegations that their appeal must be addressed on the merits and not dismissed. The term "substantial evidence" is defined as such relevant evidence as reasonable minds might accept as adequate to support a conclusion. *Yuhas v. W.C.A.B. (City of Pittsburgh),* 82 Pa.Cmwlth. 390, 476 A.2d 1377 (1984). There is substantial evidence that the Petitioners did not receive adequate notice under the facts and circumstances.

By having their case dismissed on summary judgment, the Petitioners' due process rights were violated. Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care. *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935); *Chauffeurs, Teamsters and Helpers v. Terry*, 110 S.Ct. 1339, 1344-45 (1990). So vital is this great constitutional right that "it is only in exceptional cases and for specific causes that a party may be deprived of it." *Grand Chute v. Winegar*, 82 U.S. 373, 375 (1872); *Jacob v. New York City,* 315 U.S. 752, 752-753 (1942).

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[1] It does not matter that one Petitioner purchased insurance from the Appellees and the other did not. The consequences of denying liability, when the Appellees acted willfully and intentionally in an unbargained contract, further suggest that there is a lack of notice as to the liability issue when the adhesive contracts are executed.

The right of jury trial in civil cases at common law is a "...right so fundamental and sacred to the citizens that it should be jealously guarded by the courts." *Id.* The jury trial is not merely a procedural device, but, a fundamental right and an essential element of self government which the drafters of the Bill of Rights sought to preserve. To safeguard that right from judicial usurpation, the Seventh Amendment prohibits federal courts from taking away the role of the jury.

The Petitioners' case must fall to the jury in order to preserve their substantive right to be heard due to the allegations made, and since this is a case of first impression before the District Court as well as this Court. *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 195, 103 S.Ct. 2706, 2709, 77 L.Ed.2d 180 (1982); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 657, 94 L.Ed. 865 (1950). The Petitioners' claims have great significance—their substantial loss of personal property due to the Appellees' intentional and willful conduct when they were the keepers of and responsible for the Petitioners' valuable property.

The fundamental requisite of due process is the opportunity to be heard. Applying the fundamental principles of such due process, it is readily apparent that the lower courts misapplied the basic constitutional concept – the Petitioners were not given a reasonable opportunity to present their case from an arbitrary or unjust appropriation, and they were denied the right to defend their interest in property that was wrongfully destroyed. In light of the fact that the Petitioners lacked proper notice of the affect of such an exculpatory

clause in a commercial setting, the decisions below must be vacated.

Since the notice was being enforced against them, the lack of such notice was a violation of the Due Process Clause of the Fourteenth Amendment,. *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 195, 103 S.Ct. 2706, 2709, 77 L.Ed.2d 180 (1982); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 657, 94 L.Ed. 865 (1950); Supreme Court's Construction of Due Process: 77 L.Ed.2d. 1485 (1999). The fundamental requisite of due process is the opportunity to be heard. Applying the fundamental principles of due process, it is readily apparent that the lower courts misapplied the basic constitutional protections.

As such, this Court should grant this Writ since this case of first impression regarding the enforceability of exculpatory clauses in a storage facility contract, that absolves the storage facility of liability. In the alternative, this Court should remand the case back to the lower courts with instructions as to the enforceability of such clauses.

II. THE PETITIONERS' CONSTITUTIONAL RIGHTS WERE VIOLATED WHEN THE LOWER COURTS MISAPPLIED FED.R.CIV.P. 68 AND THEN DISMISSED THE CASE.

The Court should grant the Petition because the lower courts erred when they held that an offer to settle could render a lawsuit moot in the absence of an Offer of Judgment pursuant to Fed.R.Civ.P. 68. The lower courts deviated from the plain language of the rule as to when an offer is appro-

priately made under the rule. Such act must be highly scrutinized since, if the decision is upheld, then at the last minute parties can make offers to the opposing side without the Rule 68 requirements just to delete a count to be presented to a trier of fact. The lower courts' actions must be strictly construed in order to uphold constitutional protection afforded to the parties. The lower courts misused the Rule 68 and took away from trial a viable claim.

The Third Circuit failed to adhere to the mandate under Fed.R. Civ. P. 68 by allowing the lower court decision to stand based solely upon a verbal settlement offer with no terms disclosed. Under the rule, "at any time more than ten (10) days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against the defending party for the money or property or to the effect specified in the offer, with costs then accrued.... An offer not accepted shall be deemed withdrawn....."

In our facts, the District Court's opinion only cited Rule 68 cases which strictly require a formal Offer of Judgment to be submitted in writing, with costs at least ten (10) days prior to trial. In the case at bar, no Offer of Judgment was made, only a verbal settlement offer. And, this offer did not include costs or even disclose the terms of the alleged offer. The District Judge even questioned the attorney for the defendants at the pre-trial hearing as to whether they had made an Offer of Judgment and the response recorded on the record was "no."

However, instead of analyzing this second issue, the District Court dismissed it *sua sponte*, and the Third Circuit affirmed it, under Fed.R.Civ.P. 68, even though no Offer of Judgment existed. Thus, the issue was never presented on its merits before any jurisdiction. A court should not be able to dismiss counts in a complaint at the eleventh hour based upon a verbal settlement offer with no terms disclosed.

The lower courts based their decision upon *Weiss v. Regal Collections*, 385 F.3d 337 (3d Cir. 2004), where the defendant made an offer of judgment under that rule. Indeed, in the opening paragraph of the opinion, the Court stated the issue in the following manner: "At issue is whether a putative class representative's claim is mooted by a Rule 68 Offer of Judgment so as to defeat federal subject matter jurisdiction in a suit requesting class-wide relief." *Id.* at 339. Aside from *Weiss* involving a class action, in every case discussed by the Court, a Rule 68 Offer of Judgment was made before it concluded a lack of case or controversy and dismissed a case as moot.

Weiss and every case it cites are distinguishable from the case at bar because Republic Western made no Rule 68 Offer of Judgment. The importance of such an Offer is to document that a valid offer, including its terms, have been made. Moreover, an Offer of Judgment must be written and made ten (10) days prior to trial. Since there were no terms of this offer which was untimely, no discussions of related costs nor even a document presented as an offer, the lower courts misapplied Rule 68 when they dismissed the count against Republic Western.

The District Court's opinion reasoned that because the limits of an insurance policy were offered four (4) days prior to trial and the Petitioners failed to accept it, the case then became moot and the Court valued the case at $0. A case that is dismissed due to lack of subject matter jurisdiction is not dismissed on the merits, and therefore, it is unusual that the judge attempted to devalue the case under these circumstances.

The same judge who authored the District Court's opinion stated on the record, that after five (5) years of protracted litigation, there was no longer a breach of the insurance contract due to the last minute offer, and that he deemed it not to be a settlement offer due to the fact that the Appellees were offering the limits of the policy without any costs or delay damages.

This decision deviates from the prior decision of another district judge of senior status who had, over one (1) year earlier, preserved the case for trial even though the Appellees had made the same offer and had deposited the limits of the insurance policy into the court, without prejudice. This senior district judge held that the case should proceed to trial with "possible delay damages and prejudgment interest."

In contrast, the district judge who authored the final opinion stated on the record that he didn't know the difference between delay damages and prejudgment interest although these were mentioned in the prior Order of the senior district judge. Regardless, apparently the final presiding district judge sought to eliminate the case any way he could and did

so by misapplying Rule 68 case law which is completely inapplicable to the case at bar.

The Third Circuit followed suit and affirmed the District Court decision but the opinion failed to mention nor even address Rule 68. The Third Circuit's opinion, like the one of the District Court's, also cited only Rule 68 cases. Although the Petitioners thoroughly discussed Rule 68 in both their Third Circuit Appeal and Petition for Rehearing En Banc, they were ignored and the only issue addressed by the Third Circuit was the issue of prejudgment interest and that it was irrelevant due to the absence of a judgment in the case. Indeed, by doing so the Third Circuit acknowledges that there was never an offer of judgment whatsoever.

These opinions are chilling as they could pave the way for insurance companies and others to be allowed to sidestep Rule 68 completely and have cases dismissed based on verbal settlement offers without any terms disclosed. If a claimant accepted such a verbal offer, made without disclosure of terms, he or she could possibly be subjected to confidentiality agreements and other requirements that would be less favorable and possibly unlawful to a Plaintiff, while concealing possible wrongdoing by a Defendant. If a Plaintiff declined the offer, then he or she could be left with nothing and be assessed costs if the decision were affirmed on appeal. This specific issue was submitted to the Third Circuit for an En Banc Rehearing but was denied. Now, this Honorable Court must grant this Writ so that such an important issue regarding Rule 68 be addressed.

Furthermore, by having a count dismissed under Rule 68 when no offer was in fact made, the Petitioners' constitutional rights were violated. Since a formal offer was not made but applied, and the Petitioners' case dismissed on summary judgment on all other counts, the Petitioners' due process rights were violated since they never had the opportunity to present their claim to a trier of fact against Republic Western Insurance. *Dimick, supra; Chauffeurs, supra; Grand Chute, supra.*

The Petitioners' right to a jury trial against Republic Western Insurance was swiped away. U.S. Const. Seventh Amendment. The Petitioners' due process rights were violated since they had no opportunity to be heard on their case against Republic Western Insurance. They had no notice of a Rule 68 offer, so such an offer could not be enforced against them. *Mennonite Bd., supra.* A misapplication of the federal rules caused the Petitioners' constitutional rights to be violated. And, Count VIII of their Complaint was never even addressed by any court.

Since the Petitioners' complaint, *in toto*, was valued at more than $75,000, the lower courts properly had jurisdiction. However, since the District Court reasoned that it did not have jurisdiction due to its rendering a partial decision over one count of the complaint, by its own reasoning it did not have the subject matter jurisdiction over the case to render any decision much less value Petitioners' claim at $0. *See Johnson v. Wattenbarger,* 361 F.3d 991 (7th Cir. 2004).

Therefore, the Petitioners respectfully request that the decisions below be vacated. In the alternative, the Petitioners

request that the case be remanded with further instructions as to the misapplication of Rule 68 and the viability of the count against Republic Western Insurance.

CONCLUSION

The United States Court of Appeals for the Third Circuit and the United States District Court for the District of New Jersey have failed to address an issue that is conflicting among the circuits in the self-storage facility setting. The lower courts failed to recognize the public policy issues that surround the adhesive contracts that have additional exculpatory clauses. Consumers, such as the Petitioners, lack actual notice of the surrendering of responsibility and liability in the event of damages. Consumers must be protected from the disregard for responsibility in maintaining facilities from known defects that cause substantial harm.

The Court should grant *certiorari* to review these important matters and prevent these cases from being disposed of on summary judgment. In the alternative, the Petitioners request that the case be remanded with instructions consistent with the arguments made herein as to the lack of enforceability of the exculpatory clause and the misapplication of Rule 68.

Respectfully submitted,

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Pro Se Petitioners

APPENDIX A – SUR PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING EN BANC, DATED APRIL 26, 2007

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 05-5002

LAUREN H. KANE;
MARTIN FEIERSTEIN,

Appellants

v.

U-HAUL INTERNATIONAL INC.; U-HAUL STORAGE INC; THREE SAC SELF STORAGE; REPUBLIC WESTERN INSURANCE COMPANY; GAB ROBINS NORTH AMERICA, INC., CORPORATIONS; DONALD CESARETTI;VICKI CESARETTI; JOHN DOE, INDIVIDUALS, REPRESENTING UNKNOWN ROOFER, CONTRACTOR AND/OR REPARIMAN COMPANY OR INDIVIDUALS; U-HAUL SOUTHERN NEW JERSEY; JOHN DOES 21-30, REPRESENTING UNKNOWN OWNER(S)

On Appeal from the United States District Court for the
District of New Jersey
(D.C. No. 01-cv-06002)
District Judge: Honorable Robert B. Kugler

Present: SCIRICA, *Chief Judge,* SLOVITER, McKEE, RENDELL, BARRY, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, JORDAN and HARDIMAN, *Circuit Judges.*

SUR PETITION FOR REHEARING
WITH SUGGESTION FOR REHEARING EN BANC

The petition for rehearing filed by Appellants having been submitted to all judges who participated in the decision of this court, and to all the other available circuit judges in active service, and a majority of the judges who concurred in the decision not having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is hereby DENIED.

BY THE COURT:

/s/ D. Michael Fisher
Circuit Judge

Dated: April 26, 2007
CLW/cc: Lauren H. Kane, Esq.
Joseph M. Toddy, Esq.

APPENDIX B – OPINION, FILED FEBRUARY 7, 2007

NON PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

05-5002

LAUREN H. KANE;
MARTIN FEIERSTEIN,

Appellants

v.

U-HAUL INTERNATIONAL INC.; U HAUL STORAGE INC; THREE SAC SELF STORAGE; REPUBLIC WESTERN INSURANCE COMPANY; GAB ROBINS NORTH AMERICA, INC., CORPORATIONS; DONALD CESARETTI; VICKI CESARETTI; JOHN DOE, INDIVIDUALS, REPRESENTING UNKNOWN MANAGERS OR MANAGEMENT COMPANY; JOHN DOES 11-20, REPRESENTING UNKNOWN ROOFER, CONTRACTOR AND/OR REPAIRMAN COMPANY OR INDIVIDUALS; U-HAUL SOUHTERN NEW JERSEY; JOHN DOES 21-30, REPRESENTED UNKNOWN OWNER(S)

On Appeal from the United States District Court
for the District of New Jersey
(D.C. No. 01-cv-06002)
District Judge: Honorable Robert B. Kugler

Submitted Under Third Circuit LAR 34.1(a)
January 9, 2007

Before: McKEE, AMBRO and FISHER, *Circuit Judges.*

(Filed: February 7, 2007)

OPINION OF THE COURT

FISHER, *Circuit Judge.*

Lauren Kane and Martin Feierstein ("Appellants") appeal the District Court's grant of summary judgment in favor of Republic Western Insurance Co., U-Haul Southern New Jersey (improperly pleaded as U-Haul International Inc., and U-Haul Storage Inc.), Three Sac Self Storage, Donald Cesaretti and Vicki Cesaretti ("Appellees"). For the following reasons, we will affirm.

I.

As we write only for the parties, who are familiar with the factual context and the procedural history of the case, we will set forth only those facts necessary to our analysis.

Appellant Feierstein signed a rental agreement to rent a storage unit at a U-Haul self storage facility in Pennsauken, New Jersey in November 1997. Appellant Kane signed a similar agreement at the same facility in July 1998. Both agreements provided that the customer agreed not to store more than $15,000 worth of property in a unit, that U-Haul

was not a bailee of the customer's property, and that the customer bore the entire risk of loss or damage to property stored, including loss or damage due to U-Haul's negligence. The agreement also offered the customer the choice of electing insurance at an additional fee. Appellant Feierstein elected not to purchase insurance, while Appellant Kane elected to purchase insurance in the amount of $15,000. A portion of the roof at the storage facility began to leak and caused water damage to the Appellant's property. The Appellants discovered the leak and the damage to their property in April 2001. The Appellants were not notified about the leak, and they claim that Appellee Vicki Cesaretti informed Appellant Feierstein that the roof had been leaking for months. U-Haul had been fixing the leak with spot-patching.

Appellant Kane notified Appellee Republic Western and an insurance adjuster met with Appellant Kane and inspected the units. The adjuster did not value the claim at that time. Several months later, Appellant Kane provided the adjuster with an inventory list and claimed over $120,000 in damages. After that time, the Appellees attempted to inspect and inventory the property in order to value the claim, but the Appellants refused to allow the inspection.[1] The Appellees' adjuster valued Appellant Kane's claim at $3,632.55. The Appellees provided $500 to the Appellants to enable them to remove their property from the storage facility. The Appellants brought suit in December 2001, alleging damages in

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[1] An Inspection did not occur until the District Court ordered one in 2003.

excess of $75,000 on multiple claims. The Appellees deposited $14,500, which was the remaining amount under the policy, with the District Court. The Appellees also notified the District Court that they stipulated that Appellant Kane's loss was the policy limit. The parties made cross-motions for summary judgment, and the District Court granted summary judgment in favor of the Appellees as to all of the Appellants' claims in two separate orders. The Appellants brought this timely appeal.

II.

We have jurisdiction over this lawsuit pursuant to 28 U.S.C. § 1291. We review the District Court's orders granting summary judgment *de novo*. *See Kneipp v. Tedder*, 95 F.3d 1199, 1204 (3d cir. 1996). We apply the same standard employed by the District Court, and view the facts in the light most favorable to the Appellants. *See Moore v. City of Philadelphia*, 461 F.3d 331, 340 (3d cir. 2006).

A.

The first question on appeal is whether the exculpatory clause is enforceable. Although the New Jersey Supreme Court has not addressed this question in the context of self-storage contracts, New Jersey law regarding exculpatory clauses is fairly well-settled. Exculpatory clauses are disfavored because exempting a party from liability "induces a want of care." *Kuzmiak v. Brookchester, Inc.*, 111 A.2d 425, 427 (N.J. 1955). However, exculpatory clauses in private agreements that do not adversely affect the public interest are generally sustained. *See Abel Holding Co., Inc. v. American*

Dist. Tel. Co., 350 A.2d 292, 297 (N.J. Super. 1975) (citation omitted). Therefore, an exculpatory clause may not be enforced if a party to the agreement is under a public duty to perform, there is unequal bargaining power between the parties, or the clause is unconscionable. *See id.* (citations omitted). [1]

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[1] Appellants claim that a bailment was created, which would impose a higher duty of care. Appellants;' rely on *Gonzalez v. A-1 Self-Storage, Inc.*, 795 A.2d 885 (N.J. Super. 2000), for this proposition. The court in *Gonzalez* determined that a bailment was created in the context of the rental of a self-storage unit based in part on N.J.Stat.Ann. § 12A:7-102(2006). Section 12A:7-102 of the New Jersey Statutes Annotated defines a baliee as a person who takes some form of title to goods by which there is acknowledgement of possession. However, the Self-Service Storage Act provides that the self-storage facility is not a warehouse as defined under N.J.Stat.Ann. §12A:7-102, unless the owner of the storage facility took some form of title to the property stored at the facility. *See* N.J.Stat.Ann. §§ 2A:44-188, 190 (2006). Because the Appellees did not take any form of title to the Appellants' property (i.e., issue a warehouse receipt or a bill of lading), the Appellants' claim that a bailment was created is without merit. Similarly, the Appellants' claim that express or implied warranties under the Uniform Commercial Code, as adopted by New Jersey, existed and were breached is without merit. It is debatable whether this claim was properly raised before the District court. Regardless, the Self-Service Storage Act makes clear that the Uniform Commercial Code, as adopted by New Jersey, does not apply to self-storage rentals unless a bailment was created. *See* N.J. Stat. Ann. § 2A-44-188 (2006). Because we discern that a bailment was not created, we conclude that no express or implied warranties existed under New Jersey law. Therefore, this claim also fails.

The Appellants claim that the exculpatory clause in this case is unenforceable because unequal bargaining power existed. Generally, invalidating a contract on this basis occurs when there is a contract of adhesion, and on of the parties has no other choice but to accept or reject the terms of the offer because of the imbalance of power. *See Vasquez v. Glassboro Serv. Ass'n Inc.*, 415 a.2d 1156, 1165-66 (N.J. 1980). The New Jersey courts have refused to enforce such a clause in the context of residential apartment leases or where an exculpatory clause is hidden in a clause which purports to confer a benefit on the "weaker" party. *See Tessler & Son, Inc. v. Sonitrol Sec. Sys. Of N. N.J., Inc.*, 497 A.2d 530, 533 (N.J. Super. 1985) (citations omitted). However, exculpatory clauses in leases for commercial property are regularly upheld because there is no inequality of bargaining power. *Abel*, 350 A.2d at 297.

The contract for the storage units clearly was standardized. However, it cannot be said that the Appellants had no opportunity to make any choices. They were provided with the option of purchasing insurance to protect against negligence for an additional fee. The public interest is not affected in light of the fact that the opportunity to elect insurance for an additional reasonable fee existed. *See Abel*, 350 A.2d at 300 (quoting *Tunkl v. Regents of Univ. of Ca.*, 383 P.2d 441, 443, (Ca.1963)). A contract for self-storage cannot be equated with a residential lease. The prohibition of enforcing exculpatory clauses in residential leases is based on housing shortages, especially affordable housing, the need for which has been recognized by the New Jersey legislature. *See, e.g.,*

Kuzmiak, 111 A.2d at 431. Additionally, the exculpatory clause and offer of insurance were both clear in the contracts signed by the Appellants. A self-storage contract is more akin to a lease for commercial space. Therefore, we agree with the District Court's determination that no unequal bargaining power existed that would make exculpatory clause unenforceable.

The Appellants also claim that the exculpatory clause is unconscionable. When addressing unconscionability claims in the context of a contract of adhesion, the New Jersey Supreme Court examines the contract as well as (1) its subject matter, (2) the bargaining positions of the parties, (3) "the degree of economic compulsion motivating the 'adhering' party," and (4) the public interest in the enforcement of the contract. *Muhammed v. County Bank of Rehoboth Beach, Del.*, 912 A.2d 88, 97 (N.J. 2006) (citation omitted). In this case, an examination of the factors does not require a finding of unconscionability. The subject matter of the contract is the lease of a self-storage unit. As to the bargaining power of the parties, the Appellants had the choice to purchase insurance. Additionally, as the Appellants concede, there are other self-storage facilities in southern New Jersey. There also does not appear to be any economic compulsion that motivated the Appellants to sign the contracts; indeed, there is no evidence to suggest that a storage unit is a necessity. *See, e.g., Rudbart v. N. Jersey Water Supply Comm'n*, 605 A.2d 681, 687 (N.J. 1992). Finally, it is hard to say that the public interest is affected by this contract. Again, as discussed above, the Appellants were allowed to protect them-

selves against negligence by purchasing insurance. *See, e.g., Abel,* 350 A.2d at 300 (quoting *Tunkl,* 383 P.2d at 443). Therefore, we conclude that the exculpatory clause is not unconscionable.

The exculpatory clause is enforceable and therefore we will affirm the District Court's grant of summary judgment in favor of the Appellees as to those claims.

B.

The next issue is whether the Appellees conduct was wanton and willful because such conduct cannot be exculpated. *See Tessler,* 497 A.2d at 533. The New Jersey Supreme Court defined wanton or willful misconduct as follows:

> It must appear that the defendant with knowledge of existing conditions, and conscious from such knowledge that injury will likely or probably result from his conduct, and with reckless indifference to the consequences, consciously and intentionally does some wrongful act or omits to discharge some duty which produces the injurious result.

McLaughlin v. Rova Farms, Inc., 266 A.2d 284, 305 (N.J. 1970). We hold that the failure of the Appellees to notify the Appellants of the leak in the roof of the storage facility did not constituted wanton and willful misconduct. The failure to notify probably constituted gross negligence, but even viewing the facts in the light most favorable to the Appellants, we find as a matter of law that this conduct or lack

thereof was not wanton and willful. Therefore, we will affirm the District Court's dismissal of this claim.[1]

C.

The Appellants also claim that the Appellees violated the New Jersey Consumer Fraud Act, N.J. Stat. Ann. § 56:8-2 (2006)("CFA"). The CFA provides in pertinent part that

> [t]he act, use or employment by any person of any unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or the knowing, concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise or real estate, or with the subsequent performance of such person as aforesaid, whether or not any person has in fact been misled, deceived or damaged thereby, is declared to be an unlawful practice.

Id. Appellants allege that the Appellees' failure to notify them about the leaks constituted unconscionable commercial practices as defined by the CFA. The New Jersey Supreme

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[1] This also resolves the Appellants' claim for punitive damages. In order to be entitled to recover punitive damages, the Appellants must prove that the Appellees' conduct was more than negligence or gross negligence. *See* N.J.Stat. Ann. § 2A:15-5.12 (2006). Because the record does not demonstrate evidence of more than some degree of negligence, we will affirm the District Court's grant of summary judgment on this claim.

Court has explained that "the standard of conduct contemplated by the unconscionable commercial practices as defined by the CFA. The New Jersey Supreme Court has explained that "the standard of conduct contemplated by the unconscionability clause is good faith, honesty in fact and observance of fair dealing." *Kugler v. Romain*, 279 A.2d 640, 652 (N.J. 1971). As discussed above, we agree with the District Court's conclusion that the exculpatory clause is not unconscionable. Similarly, the failure to notify the Appellants of the leak does not constitute an unconscionable commercial practice. Although we do not condone the Appellees conduct in this case, it does not rise to the level of what the New Jersey courts have found to constitute unconscionable commercial practices under the CFA. *See, e.g., Kugler*, 279 at 652-54; *49 Prospect St. Tenants Ass'n v. Sheva Gardens, Inc.*, 547 A.2d 1134, 1142 (N.J. Super. 1988). Therefore, we will affirm the District Court's grant of summary judgment of this claim.

D.

The Appellants next claim that Appellee Republic Western engaged in bad faith adjustment of the insurance claim.[1] New Jersey law recognizes such a claim. *See Pickett v.*

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[1] The Appellants also assert on appeal that Appellee Republic Western violated various provisions of the New Jersey Administrative Code regulating insurance practices. *See, e.g.*, N.J.Admin. Code § 11.2-17(2006). However, these claims were not raised before the District Court, nor included in the Third Amended Complaint, and therefore the Appellants have waived such claims.

Lloyd's, 621 A.2d 445, 450-51 (N.J. 1993). In *Pickett*, the New Jersey Supreme Court explained that a settlement offer by an insurer must be made in good faith, and be honest and intelligent in light of the insurer's experience. *Id.* at 450. The court adopted an approach taken by the Rhode Island Supreme Court, which held that if a claim is fairly debatable, then no liability arises. *Id.* at 453 (citation omitted). We agree with the District Court that the claim was fairly debatable in this case. Appellant Kane claimed that her property damage was approximately $120,000. The Appellants then refused to allow further inspection of their property for a significant period of time. When Republic Western eventually was able to inspect and value the property, its adjuster (an expert) determined that the amount of the lose was only $3,632.55. In light of the significant difference between these two valuations, and the fact that Republic Western could not attempt to settle until it was provided access to the property, it is easy to say that the claim was fairly debatable. Therefore, we will affirm the District Court's grant of summary judgment as to this claim.

E.

The final claim that the Appellants raise in this appeal is that the District Court erred by dismissing Appellant Kane's claim for breach of contract against Appellee Republic Western. The Appellants claim that the District Court's conclusion claim is moot –because Republic Western offered the policy limit of $15,000 (minus $500 previously paid) and Appellant Kane agreed that she was only entitled to that amount – was incorrect because Appellant Kane may be ent-

itled to prejudgment interest. We agree with the District court that this remaining claim is moot because the Appellant Kane was offered the full amount that she could recover. *See Weiss v. Regal Collections,* 385 F.3d 337, 340 (3d Cir. 2004). As there was no judgment in this case, Appellant Kane cannot recover prejudgment interest. *See Wilts v. Eighner,* 402 A.2d 269, 271 (N.J. Super .1978). Therefore, we will affirm.

III.

For the foregoing reasons, we will affirm the District Court's grant of summary judgment as to all of the Appellants' claims in favor of the Appellees.

APPENDIX C – NOTICE OF APPEAL, DATED NOVEMBER 10, 2005

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

LAUREN KANE AND
MARTIN FEIERSTEIN

Plaintiffs

v.

U-HAUL INTERNATIONAL, INC., U-HAUL STORAGE, INC., THREE SAC SELF STORAGE. ITS PARTNERS AND REPRESENTATIVES, REPUBLIC WESTERN INS COMPANY, GAB ROBINS NORTH AMERICA, INC., DONALD AND VICKI CESARETTI, JOHN DOES 11-20 REPRESENTING UNKNOWN ROOFER, CONTRACTOR AND/OR REPAIRMAN COMPANY OR INDVIDUASL, U-HAUL SOUTHERN NEW JERSEY, INC., AND JOHN DOES REPRESENTING UNKNOWN OWNERS

Civil Action No. 01cv6002 (SSB)

Defendants

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that Plaintiffs, Lauren Kane, and Martin Feierstein, hereby appeal to the United States Court of Appeals for the Third Circuit from the Order entered March 31, 2004 granting Defendants' Motion for Summary Judgment on Plaintiffs' Negligence Claims (Count I, Count IV, Count V, Count VI, Count VII, Count IX, Count X, Count XIII); Plaintiffs' Breach of Contract Claims (Count II, Count III); Plaintiffs' New Jersey Consumer Fraud Act Claim (Count XI); Plaintiffs' Intentional Misrepresentation Claim (Count XII); Plaintiffs' Bad Faith Claim (Count XV); Plaintiffs' Punitive Damages Claim (Count XIV); and from the Order of October 14 ,2005 dismissing Plaintiffs' remaining Claim for Breach of Contract against Republic Western Insurance Company (part of Count III).[1]

Respectfully submitted,

Law Offices of Lauren H. Kane

BY: _____

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[1] The Order never addressed Plaintiffs' Claim for Breach of Contract (Count VIII).

APPENDIX D – OPINION ON MOTIONS FOR SUMMARY JUDGMENT, FILED MARCH 30, 2004

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Lauren Kane, Esquire and Martin Feierstein	:	
Plaintiffs,	:	Civil Action
v.	:	No. 01-6002(SSB)
U-Haul International, Inc., U-Haul Storage Inc; Three Sac Self Storage, Its Partners and Representatives; Republic Western Insurance Company; Donald Cesaretti, Vicki Cesaretti; John Does 1 thru 10 Individuals; John Does 11-20; and John Does 21-30.	:	**OPINION ON MOTIONS: FOR SUMMARY JUDGMENT**
Defendants.	:	

APPEARANCES:

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Attorney for Defendant GAB Robins North America, Inc.

BROTMAN, DISTRICT JUDGE.

Presently before this Court are Plaintiffs' Lauren Kane, Esq. and Martin Feierstein (hereafter "Plaintiffs" or "Kane" and "Feierstein") and Defendants' Republic Western Insurance Co., U-Haul Southern New Jersey (improperly pleaded as U-Haul International Inc., and U-Haul Storage Inc.), Three Sac Self Storage, Donald Cesaretti and Vicki Cesaretti (hereafter "Defendants" or "Republic" and "U-Haul" and "Three Sac" and "Cesaretti."), cross-motions for summary judgment under Federal Rule of Civil Procedure 56.

I. FACTUAL AND PROCEDURAL HISTORY

On or about November 10, 1997, Plaintiff, Martin S. Feierstein entered into a rental agreement with U-Haul Southern New Jersey to rent a storage unit at the U-Haul storage facility in Pennsauken, New Jersey to store collectibles and other items. (Def.Stmnt. of Mat. Facts at 1). Plaintiff Lauren Kane executed a similar agreement with U-Haul in July 14, 1998 to store attorney legal files and personality. (Id.) Feierstein rented storage unit 5216 while Kane rented unit 4208. (Id.)

Plaintiffs allege that, during the second week of April 2001, Feierstein visited the storage united and discovered water damage to some of the items. (Pl. Mot. At 3). He contends that he also observed a U-Haul tarp about unite 5216, a bucket and mop below the unit, and several large U-Haul blankets surrounding the row of units. (Id). U-Haul had not notified Plaintiffs to inform them that leaking had occurred at the storage facility. Upon discover, Feierstein immediately approached the site's managers, Donald and Vicki Cesaretti told Feierstein that the roof. (Id.) Until that point, U-Haul had been fixing the roof with spot-patching. (Id.).

After receiving notice of the incident, John Signs, an insurance adjuster, met with Kane and inspected the units. (Def. Stmnt.Facts at 3). Approximately three and a half months after that meeting, Kane provided Signs with an inventory list, claiming damages of over $120,000. Due to the large value of claimed damages, Defendants forwarded the claim to a more senior adjuster and hired an appraiser to accurately value the loss. Defendants contend that Plaintiffs

ignored or denied their numerous requests to allow the appraiser to enter the units and value the property. (Id. at 3-4). On October 10, 2001, Plaintiffs called Defendants and informed them that they were unwilling to allow an adjuster to inspect and inventory the allegedly damage items. (Id.) On or about May 16, 2002, Defendants notified Plaintiff's counsel that they had scheduled an inspection of Plaintiff's property, subject to their availability. Further requests for inspection were made by Defendants on June 7, 2002; September 6, 2002; September 23, 2002; and October 24, 2002. Defendants finally scheduled an inspection on November 13, 2002 and November 14, 2002. However, on November 13, 2002, Plaintiff Feierstein informed Karen Washko, the adjuster retained by Defendants, that he would not permit the inspection to go forward. Thereafter, on November 20, 2002 Defendants sought leave from the Court to file a motion to dismiss the complaint for failing to make discovery. (Id. at 4-5). Defendants' adjuster was granted permission to inspect the property on February 19, 2003, after the Court ordered the inspection to be complete by the date. Defendant's expert, Karen Washko, valued Plaintiffs' loss at $3,632.55 (Id. at 5).

Defendants have tendered $500 to Plaintiffs to assist in the removal of their belongings. Defendants claim, however, that the exculpatory clauses contained in the rental agreements insulate U-Haul from any liability.

On December 21, 2001, Plaintiffs Kane and Feierstein filed a complaint against Defendants, which was thereafter amended twice. The Third Amended Complaint, filed on

April 9, 2003, alleges Negligence (Count I, IV, V, IX and X), Breach of Contract (Counts II, III and VIII), violation of the New Jersey Consumer Fraud Act (Count XI), Intentional Misrepresentation (Count XII), Punitive Damages (Count XIV), and Bad Faith (Count XV) against U-Haul of Southern New Jersey (improperly pleaded as U-Haul International, Inc., and U-Haul Storage Inc.), Three Sac Self Storage, Republic Western Insurance Company, Donald Cesaretti and Vicki Cesaretti.

Plaintiffs move for summary judgment on numerous grounds. Initially, Plaintiffs assert that the rental agreement, signed by the parties and limiting the liability of U-Haul, was unconscionable and should be rendered void. (Pl.Mot. Sum. Judg. at 5). Second Plaintiffs move for summary judgment, contending that Defendants' unconscionable practices violated the New Jersey Consumer Fraud Act (Count XI) as a matter of law. (Id. at 6) Kane and Feierstein estimate their claim at approximately $140,632.42 and move for treble damages and attorneys fees under the Act. Third, Plaintiffs move for summary judgment on their bad faith claim (Count XV), alleging that Defendant's settlement offers have been made in bad faith. (Id. at 10). Finally, Plaintiffs move for summary judgment on their negligence claim (Counts I, IV, V, VI, IX, X, and XIII) contending that Defendants can be sued in negligence as a bailor and that upon the evidence the Court should find that Defendants were negligent as a matter of law.

Defendants cross-move for summary judgment, contending that the exculpatory clause contained in the rental agreement executed by the parties, exculpating Defendants from

any liability for negligence, is valid under New Jersey and should be enforced as written. In the alternative, Defendants argue that their liability should be limited or negated by the limitation of liability clause in the contracts and by Kane and Feierstein's own breach of contract. Third, Defendants move for summary judgment on the New Jersey Consumer Fraud Act claim, alleging that they could not have made misrepresentations regarding the presence of leaks in the roof because the leaks did not exist at the time the parties entered into the rental agreement. Defendants also move for summary judgment on Plaintiffs' bad faith claim, contending that they acted in the utmost good faith in investigating and attempting to settle the claim. Finally, Defendants move for summary judgment on Plaintiffs' claim for punitive damages as they contend that there was no actual malice or wanton and willful conduct.

II. JURISDICTION

This Court has diversity jurisdiction under 28 U.S.C. § 1332(a) as the parties are residents of diverse states and the amount in controversy exceeds $75,000. 28 U.S.C. § 1332 (a).

III. STANDARD FOR SUMMARY JUDGMENT

The standard for granting a motion for summary judgment is a stringent one, but it is not insurmountable. Fed.R.Civ.P. 56 provides that summary judgment may be granted only when materials of record "show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Serbin v. Bora Corp.*, 96 F.3d 66, 69 n.2 (3d Cir. 1996). In deciding whether there

is a disputed issue of material fact, the court must grant all reasonable inferences from the evidence to the non-moving party. The threshold inquiry is whether there are "any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986).

Supreme court decisions mandate that a summary judgment motion must be granted unless the party opposing the motion "provides evidence 'such that a reasonable jury could return a verdict for the nonmoving party.'" *Lawrence v. National Westminister Bank New Jersey*, 98 F.3d 61, 65 (3d cir. 1996) (quoting *Anderson*, 477 U.S. at 248). Once the moving party has carried its burden of establishing the absence of a genuine issue of material fact, "Its opponent must do more than simply show that there is some metaphysical doubt as to material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). The non-moving party must "make a showing sufficient to establish the existence of [every] element essential to that party's case, and on which that party will bear the burden of proof at trial." *Serbin*, 96 F.3d at 69 n.2 (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)); *see also Quiroga v. Hasbro, Inc.*, 934 F.2d 497, 500 (3d Cir. 1991) (declaring that non-movant may not "rest upon mere allegations, general denials, or ...vague statements"). Thus, if the non-movant's evidence is merely "colorable" or is "not significantly probative," the court may grant summary judgment. *Anderson*, 477 U.S. at 249-50.

III. DISCUSSION

A. Negligence and Breach of Contract Claims

(1) The Rental Agreement

Plaintiff Kane and Feierstein executed their respective rental agreements with U-Haul prior to renting their storage units. Each contract contained an exculpatory clause, limiting the liability of U-Haul for its negligence. However, the exculpatory clauses in each Plaintiffs' contract contained somewhat different language.

Plaintiff Feierstein executed his rental agreement in November 1997. His contract contained a bold-typed exculpatory provision that stated **"Customer bears entire risk of loss or damage to any property stored, including but not limited to loss or damage resulting from the negligence of U-Haul."** The rental agreement also contained an offer to provide customers with up to $15,000 of insurance coverage at an added expense to those who chose to purchase the insurance, deemed "Safestor Protection." The contract stated "Customer understands that this self storage facility: (1) Is not responsible for loss to customer's property; (2) Requires that customers provide their own insurance coverage or be 'self-insured' (personally assume all responsibility for loss)." The following provision states "customer has decided (check one): ___ Yes, I wish to purchase Safestor Protection in coverage limited indicated (checked), or ____ No, I do not wish to purchase Safestor Protection and I understand that I bear full responsibility for any loss." The agreement also provided areas to check to indicate the amount of insurance coverage

purchased, $4,000 for $6/month fee, $10,000 for a $18/month fee or $15,000 for a $24/month fee. Feierstein did not check either the Yes or No box, nor did he check any of the boxes specifying a protection limit. However, the contract states Feierstein's monthly fee is $19.95, then has a line drawn through the space provided to add the extra Safestor Protection fee totals Feierstein's charges as $19.95. This, along with the fact that Feierstein did not check the Yes box or any of the protection limit boxes, signifies that Feierstein election not to purchase the insurance coverage provided by the company. The rental agreement also contained a warning which state "Warning-Do Not Store the Following" and listed ten categories of things that should not be stored in the units, including "Property with a value over $15,000." The second page of the contract states "Attention...This is a month-to-month lease...U-haul is not a bailee of customer's property. **U-Haul does not accept control, custody or responsibility for the care of property."** The second page of the agreement again warns customers not to store highly valuable goods in the storage unit, stating, "Warning...Customer agrees not to store property with a total value in excess o $15,000." Plaintiff Martin S. Feierstein signed the agreement.

Plaintiff Lauren H. Kane, Esq. signed an almost identical rental agreement with U-Haul in July 1998. The first page of her contract contained the same bold-typed exculpatory provision as Feierstein's stating, **"Customer bears entire risk or loss or damage to any property stored, including but not limited to loss or damage resulting from the negli**

-gence of U-Haul." It also contained the warning which stated "Warning-Do Not Store the Following" including "Property with a value over $15,000," as one of ten enumerated categories of forbidden items. The offer of the "Safestor Protection" insurance on Kane's contract was identical to that of Feierstein's, however Kane's contract also contained a provision that stated "Customer is advised to purchase insurance for personal property stored in this storage facility. Such insurance is available through most insurers." This provision was followed by the offer of up to $15,000 of insurance through U-Haul's insurance company, Republic Western. Kane did not check the Yes or No box, however she did elect the $15,000 of insurance at a fee of $24/month by checking the box next to that offer. The second page of Kane's contract stated "Attention...This is a month-to-month lease...U-Haul is not a bailee of customer's property. **U-Haul does not accept control, custody or responsibility for the care of property,"** and "Warning...Customer agrees not to store property with a total value in excess of $15,000...Customer agrees not to store collectibles, heirlooms, jewelry, works of art, or any other item of sentimental value." Plaintiff Kane signed the agreement.

Both of the contracts contain a section describing the Safestor Protection insurance coverage. This section provides the following: "Safestor protection is only effective for customers who have elected Safestor protection on the reverse side of this form, and paid the appropriate Safestor fee...Safestor fees must be paid in advance for the same number of months for which you make storage-rent pay-

ments. Nonpayment or breach of rental agreement automatically terminates this protection."

(2) Plaintiff's Reliance on Gonzalez

Plaintiffs rely on *Gonzalez v. A-1 Self Storage, Inc.*, 795 A.2d 885, 888 (N.J. Super Ct. Law Div 2000) to support their contention that an exculpatory clause such as the one in the U-Haul rental agreement is unconscionable and invalid. They allege that the limitation of liability clause "so perverts the ideals of good faith and fair dealing that the contract as a whole is rendered unconscionable." (Pl. Br. At 5). In Gonzalez, the New Jersey Superior Court Law Division held that the exculpatory clause contained in the rental agreement for a self-storage unit, limiting the liability of the facility owner to $50 was unconscionable. The court found that: (1) a bailor/bailee relationship existed between the parties; and (2) the exculpatory clause was unenforceable because of unconscionability. The court's finding that a bailor/baliee relationship existed is paramount because once that relationship is determined, a presumption of negligence is placed upon the bailor, who, by definition, has agreed to take custody and safeguard the bailee's belongings. *See* N.J.S.A. 12A-7-204; *Jasphy v. Osinsky*, 834 A.2d 426, 432 (N.J. Super. Ct. App. Div. 2003) (limitation of liability clause conflicts with warehouseman's duty under the statute). This weighs heavily in favor of finding an exculpatory clause invalid as the inclusion of an exculpatory clause in a bailment removes the incentive for bailors to perform their duty of due care and the removal of such a duty renders the exculpatory clause in contravention of public policy. *See e.g. Valhal Corp. v. Sullivan Assoc.*, 44 F.3d 195 (3d Cir. 1995).

The court in *Gonzalez* reviewed several factors in its unconscionability consideration that are not before this Court in the present case. For example, in that case, the contract not only exculpated the defendant from liability for its negligence but also required the plaintiff to indemnify the defendant and to pay all of defendant's attorney's fees and costs. The contract also required the plaintiff to purchase insurance while denying a potential third party insurance company its right to sue defendant. Furthermore, the court seemed to consider the sentimental nature of the plaintiff's destroyed items as a persuasive point. Noting that some of the items were valuable which had been handed down through generations of family members. *See Gonzalez*, 795 A.2d at 886.

(3) The Relationship Between the Parties

Plaintiffs' reliance on *Gonzalez* requires a finding that a bailor/bailee relationship was created through the rental agreement for the storage units. Legal precedent in this area, however, suggest the proper finding is that a self-storage unit does not create a bailment as it is more akin to the lease of space than the custodial safe-keeping of goods. The situation has been describe as follows:

> While the fact that one rents a definite space in which to store goods does not show conclusively that the arrangement is a lease rather than bailment, one who merely grants storage room, without expressedly or impliedly assuming any duty or responsibility with respect to the care or control of

> the property stored, is not a bailee. Thus, the proprietor of a locker service who has no control over property placed in a locker, to which the depositor retains the key, does not become a bailee of the contents of the locker. On the other hand, a warehouseman who offers to store goods for a price is a bailee for hire of goods which are accepted and stored in the warehouse; the essence of such transaction is delivery of the property to the bailee for safekeeping or custody, and its acceptance for that purpose by the bailee. 8A Am.Jr.2d Bailments § 19 (May 2003)

The New Jersey Supreme Court has never considered the status of self-storage relationships. However, other courts which have pondered the matter have found that the rentals of self-storage units create a lessor/lessee relationship rather than a bailment. *See Jones v. Hanna,* 814 S.W.2d 287 (Ky.Ct.App.1991)(finding an agreement to rent a mini warehouse storage unit did not include delivery of the tenant's personal property to the landlord and, thus, did not create a bailment, where the tenant placed a lock on the unit and the landlord therefore did not exercise control over the property); *Ross v. Tuck-It-Away, Inc.,* 180 A.D.2d 428, 429 (NY 1st Dept. 1992)(holding the relationship between a person who rented a self-storage facility and the operator of the facility was that of landlord and tenant and not that of bailor and bailee); *Hutton v. Public Storage Management, Inc.,* 676 N.Y.S.2d 886, 886 (N.Y.App.Div.1998)(finding that person who rents storage unit at self-storage facility and retains own

lock has relationship of lessor and lessee with facility owner, rather than bailor and bailee, such that there is no presumption of negligence as in a bailment relationship); *United States v. Real Property,* 976 F.Supp. 1327, 1357-1358 (D.N.V. 1997) (holding under Hawaii law, relationship between a self-storage business and its customers was not a bailment but a lease, because the business owner has no possession or control of the goods); *Sackett v. Public Storage Management,* 222 Cal.App.3d 1088, 1092 (Cal.Ct.App.1990) (holding that owner of a self-storage facility was not a bailor because "there must be some consensual act in connection with the possession of the personal property leading to a duty to exercise reasonable care with respect to it") (citations omitted).

The rental of a self-storage unit is akin to the rental of a locker to deposit goods or a parking facility in which the owner retains the keys to his car, neither of which creates a bailment. *See Marsh v. American Locker Co.,* 72 A.2d 343, 346 (N.J. Super.Ct.App.Div. 1950)(holding deposit of goods in a locker does not create a common law bailment); 8A Am.Jur. 2d Bailments § 19 (May 2003) (stating in cases involving the storage of automobiles, "a mere license or lease relationship arises...if the owner retains control over the vehicle by retaining the keys.") *Haygan v. United States,* 627 F.Supp. 749, 751 (D.D.C.1986) (holding "park & lock" arrangements create either lease or license, not a contract for bailment).

(4) The Enforceability of Exculpatory Clauses under New Jersey Law

Exculpatory clauses are generally enforceable under New Jersey law and are deemed valid absent any public policy interest, public duty to perform, unequal bargaining power or other unconscionability. *See Tessler and Son, Inc. v. Sonitrol Security Systems of Northern New Jersey, Inc.*, 497 A.2d 530, 533 (N.J. Super.Ct.App.Div.1985). New Jersey courts have found exculpatory clauses invalid as against public policy in the case of public utilities/common carriers with duties to perform and in residential leases where unequal bargaining exists because housing is at a premium. *See if; Kumiak v. Brookchester*, 111 A.2d 425, 432 (N.J. Super. App.Div. 1955). In reviewing exculpatory clauses, the goal of protecting public policy interests is coupled with the state's long-standing interest in freedom of contract. *Hosiery Corp. of America, Inc. v. Int'l Data Processing, Inc.*, Civ. No. 89-115, 119 WL 30015 (D.N.J. Feb. 28, 1991) (exculpatory clause is valid where the exculpated party is under no duty to perform and where the contract does not grow out of unequal bargaining power).

"It is clear that private parties to a transaction lacking public interest are bound by their agreements relieving against liability or negligence." *Kuzmiak v. Brookchester*, 111 A.2d 425, 427 (N.J. Super. 1955). The cases in which the New Jersey courts have found unconscionability have clear public policy concerns. *See Kuzmiak*, 111 A.2d at 427 (holding ex

culpatory clause invalid for residential lease when housing was at a premium); *Cardona v. Eden Realty co.*, 288 A.2d 34, 36 (N.J. Super. 1972) (holding exculpatory clause in a tenement lease invalid because of unequal bargaining power). On the other hand, courts in this Circuit have refused to invalidate exculpatory clauses in private party contracts that do not affect the public interest. *See Farris Engineering Corp. v. Service Bureau Corp.*, 276 F.Supp. 643, 645 (D.N.J. 1967) (finding exculpatory clauses in private party contracts that do not affect the public interest) *Neuchatel Ins. v. ADT Sec Sys. Inc.*, Civ. No. 96-5396, 1997 WL 539687 (E.D.Pa. Aug. 11, 1997) (clause limiting liability for damages resulting from malfunction of a fire alarm system was not unconscionable since the cost of the alarm system could not be deemed to insure against property loss); *Cincinnati Milacron-Heald Corp. v. Universal Maritime Service Corp.*, Civl No. 4030, 1995 WL 846691, * 4 (D.N.J. 1995) (finding exculpatory clause limiting liability to $500 was not unconscionable because there was no public policy interest to void the clause); *Ultimate Computer Services, Inc. v. Biltmore Realty Co., Inc.*, 443 A.2d 723, 726 (N.J.Super.Ct.App.Div. 1982) (exculpatory clauses are not void as against public policy in commercial or industrial leases.)

New Jersey courts permit the use of exculpatory clauses to shield a private party from liability, with one condition: the clause must explicitly advert to the negligence of the party claiming its protection. *See Freddi-Gail Inc. v. Royal Holding Corp.*, 34 N.J. Super. 142 (N.J. Super.Ct.App.Div.1995) (exculpatory clause did not shield landlord for liability from water damage because it did not refer to the landlord's af-

firmative acts of negligence): *Carbone v. Cortland Realty Corp.*, 58 N.J. 366, 368 (1971) (exculpatory clause in commercial lease did not clearly immunize landlord for his own negligence).

The goal of this federal court, sitting in diversity, is to apply the law of the state of New Jersey as it believes the highest court of that state would apply its own law. The New Jersey Supreme Court has not spoke on the relationship created between the renter of a self-storage unit and the owner of the facility. This Court believes, however, that it would not follow the analysis in *Gonzalez*. It is clear from the myriad cases on bailments and exculpatory clauses under New Jersey law, that the situation in the present case, in which a party rents a self-storage unit, purchases its own lock and retains unfettered access to that unit, does not create a bailment and does not create a presumption that an exculpatory clause in the rental agreement between the parties is invalid. As far as *Gonzalez* diverges from this opinion, the Court believes its reasoning is flawed. In *Gonzalez*, the Law Division relied on the Black's Law Dictionary definition of bailment to find that a bailment was created between the parties. Under that definition, a bailment for hire is defined as:

> A contract in which the bailor agrees to pay an adequate recompense for the safe-keeping of the thing intrusted to the custody of the bailee, and the bailee agrees to keep it and restore it on the request of the bailor, in the same condition substantially as he received it, excepting injury or loss from causes for which he is not responsible.

Black's Law Dictionary 179 (Rev. 4th ed. 1994).

This definition, explicitly precludes the formation of a bailment in the present situation. In this case, Plaintiffs did not pay Defendants for the safe-keeping of their goods; they paid defendants to lease a unit, over which the lessee would exercise total control. Defendants never took Plaintiffs' goods into custody. They did not inventory Plaintiffs' goods. Plaintiffs purchased their own locks and moved their own goods into their units, without the assistance of the Defendants. Defendants offered a contract which explicitly stated: (1) they were not taking Plaintiffs' goods and custody; (2) no bailment was created; (3) Plaintiffs were responsible for their own property; (4) Defendants were not responsible for any injury to the goods, including injury resultant from Defendants' negligence; and (5) Plaintiffs were advised to purchase insurance to protect their property. Defendants expressly disavowed any responsibility for the safekeeping of Plaintiffs' goods or for the return of the goods in the same condition. *See Sackett v. Public Storage Management,* 222 Cal.App.3d 1088, 1092 (Cal.Ct.App.1990) (holding that owner of a self-storage facility was not a bailor because "'there must be some consensual act in connection with the possession of personal property leading to a duty to exercise reasonable care with respect to it.'") (citation omitted). The rental agreement, entered into by the parties in the present agreement, created a lessor/lessee relationship, rather than a bailment. Defendants agreed to lease a self-storage space to Plaintiffs and Plaintiffs agreed that Defendant would not be held liable for any negligent actions which may

cause harm to Plaintiffs' property. This was the essence of the bargain between the parties.

The principle of unconscionability was developed to avoid transaction that are so one-sided so as to create oppression and unfair surprise. This concept is necessarily applied in cases in which unequal bargaining power arises because of a lack of education or lack of access to a basic human need such as residential housing. The U-Haul rental agreement is not akin to a residential lease during a time when housing is at a premium; it is more similar to a commercial lease of space, which contains no public policy consideration. Plaintiffs were free to enter into the agreement, attempt to renegotiate the terms, or take their business elsewhere. Should Plaintiffs Kane and Feierstein, an educated attorney and entrepreneur, have disliked the contract provisions provided in U-Haul's rental agreement, there are a multitude of other self-storage facilities in the area. These facilities may have charged higher prices in exchange for more favorable contract terms.

It is not for this Court to create a better bargain for educated, knowing individuals who happened to enter into poor contractual arrangements. *See Chemical Bank of New Jersey v. Bailey*, 687 A.2d 316, 322 (N.J. Super. Ct. 1997) (upholding exculpatory clause in underwriting agreement) ("In a commercial setting, [t] he judiciary will not undertake the writing of a different or better contract between the parties."') (citations omitted). Plaintiffs Kane and Feierstein have suffered no oppression or unfair surprise in this instance. The U-Haul contract was explicit, clear and to the point. The exculpatory provision were printed in large print

and some were in bold. Plaintiffs read and signed those contracts, which clearly exculpated U-haul from liability for damage to the stored property, even damage resulting from U-haul's own negligence. *See Fleming Companies, Inc. v. Thriftway Medford Lakes, Inc,* 913 F. Supp.837, 843 (D.N.J. 1995) ("[I]t is well-settled that affixing a signature to a contract creates a conclusive presumption that the signer read, understood and assented to its terms. Furthermore, the stability of contract obligations cannot be undermined by the judicial sympathy and courts should not interfere between parties where the terms of the parties' contract are clear.") If Plaintiffs chose not to read those contracts, that is a lesson with which they must live. The Court would assume an attorney, such as Kane, would advise herself and her husband, Feierstein, of one of the basic tenants of contract law: failure to read a contract does not release any of the liability that derives from attaching a signature to that document. Furthermore, if the provisions were unacceptable to Plaintiffs, they could have attempted to negotiate such provisions or refused to enter into the agreements. However, this was not done. Plaintiffs signed the agreements, bought their locks, and moved their belongings into their self-storage units. They now claim unconscionability in the contract, three to four years later, when some of the goods are allegedly damaged by water entering through a leak in the units' roof. This is not the proper context for the doctrine of unconscionability. *See St. Paul Fire & Marine Insurance Co. v. Wells Fargo Alarm Services*, Civ. No. 95-712, 1995 WF 306642, * 3 (D.N.J. 1995) (holding exculpatory clause enforceable to relieve liability for negligence or gross negligence) ("Under New Jersey law, exculpatory clauses in private contracts are

generally enforceable unless a party to the contract is either under a public duty entailing the exercise of care, such as common carrier or public utility, or if there is unequal bargaining power between the parties."); *Reynolds Publisher's Inc. v. Graphics Financial Group, Ltd.*, 938 F. Supp. 256, 266 (D.N.J. 1996) ("generally New Jersey courts apply the unconscionablity doctrine to protect 'those most subject to exploitation - - the uneducated, the inexperienced and the people of low incomes.'") (citation omitted).

Furthermore, the consumers in this case were alerted to purchase insurance to protect their property. Plaintiff Kane elected to purchase $15,000.00 of insurance. Plaintiff Feierstein chose not to purchase any coverage. These decisions properly allocated the risk in this commercial setting. "Where the interpretation of exculpatory clauses are involved, 'the central question is not whether the parties agreed to insure against loss the risks they severally assumed *inter sese* but, rather, whether they so clearly allocated the risks that each party knew, or should have know, the existence of its contingent liability and was thus placed in a position where it could protect itself against such loss by adequate insurance coverage or otherwise.'" *Chemical Bank*, 687 A.2d at 322 (quoting *Swisscraft Novelty Co. v. Alad Realty Corp.*, 272 A.2d 59, 59 (N.J. Super Ct. App. Div. 1971). Here, the contract plainly allocated that risk to Plaintiffs and it was not unconscionable for the agreement to do so. *See Midland Carpet Corp. v. Franklin Assoc. Properties*, 216 A.2d 231, 234 (N.J. Super Ct. 1966) (holding that exculpatory clauses in leases of industrial property, rather than residential leases, are normally valid and enforceable) ("'It is

generally contemplated, as was here specifically arranged for in the contract, that the risk of accident claims will be covered by insurance, and the only practical feature of the bargain, ordinarily, is the decision as to who is to bear the cost of the insurance.'") (quoting *Buscagia v. Owens Corning Fiberglas*, 172 A.2d 703, 707 (N.J. Super. Ct. App. Div. 1961) (discussing indemnification agreements in construction contracts).

The Court finds that the execution of the rental agreement created a lessor/lessee relationship and did not create a bailment. Therefore, no higher duty of care was placed upon Defendants and no public policy concerns were affected by the exculpatory clause in the contract. The Court finds that clause was valid and shields Defendants from any claims for negligence or breach of contract. This excludes Plaintiffs' claim for breach of contract against Republic Western Insurance Company (part of Count III) for its alleged nonpayment of insurance proceeds as that action could rise to the level of willful and wanton breach of contract which can not be shielded by an exculpatory clause. *See Hosiery Corp. of America, Inc. v. Int'l Data Processing, Inc.*, Civ. No. 89-115, 1991 WL 30015, * 13 (D.N.J. Feb. 28, 1991). Defendants' motion for summary judgment on Plaintiffs' negligence (Count I, Count IV, Count V, Count VI, Count VII, Count IX, Count X, Count XIII) and breach of contract claims (Count II, Count III), pursuant to the above exception, is granted. The Court denies Plaintiffs' motion an dismisses Plaintiffs' negligence claims.

B. Bad Faith Claim

Plaintiffs and Defendants cross-move for summary judgment on Plaintiffs' bad faith claim. Plaintiffs allege that Defendants' meager settlement offers demonstrate a bad faith effort on the part of Defendants to resolve Plaintiffs' claims. Defendants argue that Plaintiffs' refusal to allow U-haul's adjusters access to the storage unit to inspect and value the damages was the true cause of delay. Secondly, Defendant's contend that Plaintiffs' valuations are in excess of $115,000 above U-Haul's adjuster's valuation.

The Supreme Court of New Jersey set the standard for bad faith claims under New Jersey law in *Pickett v. Lloyd's,* 621 A.2d 445 (N.J. 1993). In *Pickett,* the court held that an insurer owes a duty of good faith to its insured when it is processing a first party claim. *Id.* At 452. The New Jersey Supreme Court held:

> A necessary corollary of that fiduciary duty to act on behalf of the insured is that a decision not to settle within the policy limits must and intelligent one in the light of the company's expertise in the field. Where reasonable and probable cause appears for rejecting a settlement offer and for defending the damage action, the good faith of the insurer will be vindicated.

Pickett, 621 A.2d at 450 (citation omitted).

Because of the insurer's duty of good faith, insurance companies are required to attempt in good faith to reach eq-

uitable settlements in cases in which liability has become clear. *Id.* At 451. In *Pickett,* the New Jersey courts created a remedy for first party bad faith causes of action, stating that if a claim is "fairly debatable," no bad faith liability will arise. This remedy was modeled after that of other jurisdictions, including the Rhode Island Supreme Court, which stated:

> To show a claim for bad faith, a plaintiff must show the absence of a reasonable basis for denying benefits of the policy and the defendant's knowledge or reckless disregard of the lack of a reasonable basis for denying the claim. It is apparent, then, that the tort of bad faith is an intentional one. *** implicit in that test is our conclusion that the knowledge of the lack of a reasonable basis may be inferred and imputed to an insurance company where there is a reckless *** indifference to facts or to proofs submitted by the insured.

Id. At 453. (quoting *Bibeault v. Hanover Ins.*, 417 a.2d. 313, 319 (R.I.. 1980) (citations omitted)).

In this case, there has been little evidence offered by the insured, other than her own valuations of the property that she claims has been injured. John Signs, the insurance adjuster who initially inspected the site in May 2001, did not valuate the loss. His suggestion, upon noting the high amount of Plaintiff's claim and upon discovering the nature of the items as "collectibles," was to pass the claim along to a more senior adjuster and an appraiser who would be skilled in valuing the worth of such collectibles. Thereafter, Defen-

dants made multiple attempts to schedule further inspections so that their expert would be able to make the correct valuations. (See Exhibits G-O). Defendants sent letter suggesting dates and asking for confirmations from Plaintiffs to provide access to the units. Requests for inspection were made by Defendants on May 16, 2002; June 7, 2002; September 6, 2002; September 23, 2002; and October 24, 2002. Plaintiffs finally scheduled the inspection for November 13 and 14, 2002. However, on November 13, 2002, Plaintiff Feierstein informed Defendants' adjuster, Karen Washko, that he would not permit the inspection to go forward. On November 20, 2002, Defendants sought leave form the Court to file a motion to dismiss the complaint for failure to take discovery. The Court ordered Plaintiffs to permit inspection by February 19, 2003. Defendants' adjuster, Karen Washko inspected the property on that date and valued Plaintiffs' loss at $3,632.55.

This is not the type of case of which *Pickett* strived to protect insured's, i.e. a case in which liability had become crystal clear and Defendants refused to attempt to reach an equitable settlement. Plaintiffs have not offered proof of liability for the amount of their property claim. Further, Plaintiffs obstructed and delayed Defendants from making their own valuation of the claim. It is ironic that Plaintiffs now argue that Defendants have not made good faith efforts to settle the claim, which Defendants' adjuster eventually valued at more than $115,000 less than Plaintiffs' claim. Any attempts to settle could not be made until Defendants were allowed access to conduct an independent investigation and valuation of the claim. Furthermore, Kane's insurance cov-

erage reached fifteen thousand dollars while Defendant's valuation of her claim is closer to four thousand. Therefore, it is unclear whether the claim should be paid to the limit of the coverage. The numerous attempts to investigate and the difference in valuations in this case make the claim "fairly debatable" at the very least and shield Defendants from any bad faith liability under *Pickett*. The Court grants Defendants' motion for summary judgment on Plaintiffs' bad faith claim, denies Plaintiffs' motion and dismisses Plaintiffs' claim.

C. Punitive Damages Claim

Defendants also move for summary judgment on Plaintiffs' claim for punitive damages (Count XIV). Plaintiffs did not oppose this motion.

Typically, under tort law, a plaintiff is entitled to recover compensatory damages, i.e., damages awarded to make an injured party whole by compensating them for their loss. Punitive damages are only awarded in exceptional circumstances as punishment of a defendant and as a deterrent of the type of conduct which caused the harm. *See Di Giovanni v. Pessel*, 260 A.2d 510, 511 (N.J. 1970); *Lithuanian Commerce Corp. v. Sara Lee Hosiery*, 219 F. Supp. 2d 600, 610 (D.N.J 2002).

> 'Something more than the mere commission of a tort is always required for punitive damages. There must be circumstance of aggravation or outrage, such as spite or 'malice,' or a fraudulent or evil motive on the part of the defendant, or such a conscious and deliberate disregard of the interest of

> others that his conduct may be called willful or wanton. Lacking this element, mere negligence, however 'gross,' is generally held not to be enough.'

Berg v. Reaction Motors Division, 181 A.2d 487, 496 (N.J. 1962) (quoting Prosser, Torts 389 at 9-10 (2d ed. 1955)). In order to support a claim for punitive damages under New Jersey law, a court must find either (1) actual malice, i.e. an evil-minded act or intentional wrongdoing; or (2) a wanton and willful disregard for the rights of others. *See id.* A wanton and willful act is one in which there is a "'positive element of conscious wrongdoing.'" *Id.* at 496 (quoting McCormick, Damages § 126 at 280 (1935)).

The New Jersey legislature passed the New Jersey Punitive Damages Act, N.J.S.A. § 2A:15-5.12 *et seq.* to codify the restriction of the use of punitive damages to extraordinary circumstances:

> Punitive damages may be awarded to the plaintiff only if the plaintiff proves, by clear and convincing evidence, that the harm suffered was the result of the defendant's act or omission, and such acts or omission were actuated malice or accompanied by a wanton and willful disregard of persons who foreseeably might be harmed by those acts or omissions. This burden of proof may not be satisfied by proof of any degree of negligence including gross negligence.

N.J.S.A. § 2A 15-5.12 (West 2004).

The Act dictates that the trier of fact consider all relevant evidence including (1) the likelihood, at the relevant time, that serious harm would arise from the defendant's conduct; (2) the defendant's awareness of reckless disregard of the likelihood that the serious harm would arise from defendant's conduct; (3) the conduct of the defendant upon learning that its initial conduct would likely cause harm; and (4) the duration of the conduct or any concealment of the conduct by the defendant. N.J.S.A. § 2A:15-5.12 (b).

Although Defendants could have possibly exercised greater care in handling the flooding at the storage facilities, negligent acts, including grossly negligent acts, do not support a claim for punitive damages under New Jersey law. *See Smith v. Whitaker*, 734 A.2d 243, 254 (N.J. 1999). The New Jersey courts have held that culpability must be in excess of the "bare bones elements of the underlying tort" and must consist of some type of intentional wrongdoing or " evil-minded act." *Boyes v. Greenwich Boat Work, Inc.*, 27 F. Supp. 2d 543, 549 (D.N.J. 1998) (denying punitive damages under common law and under the New Jersey Consumer Fraud Act because there was no evidence of evil intent in the defendant's actions). In order for Defendants to be held liable on a theory of willful and wanton conduct, Plaintiffs would have to show that the defendants committed a "deliberate act or omission with knowledge of high degree of probability of harm and reckless indifference to the consequences." *Berg*, 181 A.2d at 496. Plaintiffs have proffered no evidence of sufficiently egregious conduct to establish a claim for willful and wanton misconduct. While the conduct which Plaintiffs allege may comprise negligence or gross

negligence, it is not the type of conduct that a reasonable person would know was sufficiently dangerous such that punitive damages would be appropriate. *See Smith*, 734 A.2d at 254. The Court grants Defendants' motion for summary judgment on punitive damages.

D. Intention Misrepresentation Claim

Defendant moves for summary judgment on Plaintiff's claim for intentional misrepresentation (Count XII) on the grounds that Plaintiffs have failed to present a prima facie case. Plaintiffs were required to prove five elements to establish a prima facie case for fraudulent misrepresentation under New Jersey law: (1) Defendant made a material misrepresentation of a *presently existing or past fact* (2) which they knew or believed to be false; (3) upon which they intended Plaintiff to rely; (4) and upon which Plaintiff reasonably did rely; (5) with resulting damages. *See In re: Resorts Int'l Inc.*, 181 F.3d 505, 509 (3d Cir. 1999) (emphasis added). Furthermore, each element is required to be proved by clear and convincing evidence. *Id.*

Plaintiffs allege that they were harmed by Defendants' representations that the storage units were climate controlled. It is Plaintiffs' contention that because the storage units leaked after a heavy rain, Defendants' assertion that the units were climate controlled were material misrepresentations. Defendants, however, made representation as to the climate controlled nature of the storage units at the time Plaintiffs entered into their rental agreements in November 1997 and July 1998. The alleged leaking occurred in March or April 2001. Plaintiffs do not offer any evidence to show that leaks

were occurring prior to 2001 or that Defendants had knowledge or reason to know that leaking may occur at the facilities at the time of the execution of the rental agreements. Therefore, Plaintiffs have failed to establish the first element of a prima facie case for intentional misrepresentation. Furthermore, any promise as to nature of the storage units in the future, can not be considered a misrepresentation.

Statements as to future or contigent events, as to expectations and probabilities, or as to what will be or is intended to be done in the future, do not constitute misrepresentations even though they turn out to be false, at least where they are not made with the intent to deceive, and where the parties have equal means of knowledge (citations omitted) or the subject is equally open to investigation of both, and an examination has not been fraudulently prevented.

Chatlos Systems, Inc. v. National Cas Register Corp., 479 F. Supp. 738, 749-749 (D.N.J. 1979).

Defendants' statement that the units were climate controlled, made at the time of the inception of the contract, referred to the present and future condition of the storage units. Plaintiffs have not shown that Defendants made these statement with the intent to deceive or that Defendants, at the time of the execution of the rental agreement, had no intention of providing a climate controlled facility. *Capano v. Borough of Stone Harbor*, 530 F. Supp. 1254, 1264 (D.N.J. 1982) ("[T]he defendant must have no intention at the time he makes the statement of fulfilling the promise.") Furthermore, once the rental agreements were signed, Plaintiffs were handed keys to the storage units and were given full

access with ample opportunity to fully inspect the units at any time. Defendants can not be held liable for representing that the units would remain climate controlled in the future, as this future, contingent event can not constitute a misrepresentation under New Jersey law, even if it turns out to false. *See Bear v. Chase, 2004 WL 350050*, at * 10 (D.N.J. May 15, 2002). Defendants' motion for summary judgment on Plaintiff's claim for intentional misrepresentation is granted and Plaintiff's claim is dismissed.

E. The New Jersey Consumer Fraud Act Claim

The New Jersey Consumer Act was passed by the New Jersey legislature to combat the practice of defrauding consumers.1 *See Interactive Logistics, Inc. v. Answerthink, Inc.*, 2001 WL 1825982, * 3 (D.N.J. Dec. 18, 2001). The Act was

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1 The New Jersey Consumer Fraud Act provides:

> The act, use or employment by any person of any unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or the knowing concealment, suppression, or omission of any material fact with the intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise or real estate, or with the subsequent performance of such person as aforesaid, whether or not any person has in fact been misled, deceived or damage thereby, is declared to be an unlawful pratice....

N.J.S.A. 58:8-2 (2001).

designed to protect consumers of merchandise and real estate from being victimized by fraudulent or deceptive selling and advertising practices. *Id.* It precludes any fraudulent misrepresentation or any "unconsciousable commercial practice." *See Hoisery Corp. of America, Inc. v. Int'l Data Processing, Inc.*, 1991 WL 30015, * 11 (D.N.J. Feb 28, 1991). An omission as well as an affirmative act may constitute a fraud under the Act. A claim for an actionable omission "requires a finding that the defendant acted 'knowingly,' while an affirmative misrepresentation is actionable even in the "absence of knowledge of the falsity of the misrepresentation, negligence or the intent to deceive." An affirmative misrepresentation is "'one which is material to the transaction and which is a statement of fact, found to be false, made to induce the buyer to make the purchase." *Ji v. Palmer*, 755 A.2d 1221, 1228 (N.J. Super. Ct. App. Div. 2000). As discussed above, the Court has already found that Plaintiffs have not shown that Defendant has committed any fraudulent misrepresentation. Nor have Plaintiffs' presented any evidence which would show that Defendants omitted to inform them of or intentionally concealed any preexisting condition at the storage units.

Therefore, for Plaintiffs to succeed on their claim under N.J.S.A 56:8-1, they would be required to prove that Defendants participated in an unconscionable commercial practice which contravened the goals of the Act. Although the Act does not define "unconscionable commercial practice", the New Jersey Supreme Court has defined the term as "'[t]he standard of conduct contemplate[ing]... good faith, honesty in fact and observance of fair dealing.' *Id.* (citations omit-

ted). The primary intent of the Act was to protect consumers from being deceived or tricked into making unwise purchases or investments. "The need for application of the subject to exploitation - - the uneducated, the inexperienced and the people of low incomes." *Kugler v. Romain*, 279 A.2d 640, 652 (N.J. 1971). For example, in *Kugler*, the Supreme Court of New Jersey held that a professional seller who attached an exorbitant price of educational packages, which were practically worthless for their alleged purposes, and targeted low incomes markets, had engaged in unconscionable practices which equated with fraud for the purposes of the New Jersey Consumer Fraud Act. *See id.* at 652.

Defendants in this case have not participated in any unconscionable commercial practice. They simply leased storage units and entered into rental agreements with Plaintiffs who are educated business people. The Defendants provided rental agreements which contained clear, evident provisions, including exculpatory clauses. Plaintiffs signed those agreements. As discussed above, exculpatory clauses are not evidence of unconscionable practices. To the contrary, clauses limiting liability are traditionally enforced under New Jersey law absent any contravention of public policy. As Defendants have not made any fraudulent misrepresentation nor committed any unconscionable business practice, Plaintiffs have no claim under the New Jersey Consumer Fraud Act. Defendants' motion for summary judgment on Plaintiffs' New Jersey Consumer Fraud Act claim is granted.

IV. CONCLUSION

For the foregoing reasons, Defendant's motion for summary judgment on Plaintiffs' negligence claims (Count I,

Count IV, Count V, Count VI, Count VII, Count IX, Count X, Count XIII), breach of contract (Count II, Count III)[2], New Jersey Consumer Fraud Act claim (Count XI), intentional misrepresentation claim (Count XII), bad faith claim (Count XV), and punitive damages claim (Count XIV) are granted.[3] Plaintiffs' cross motions are denied. The Court will enter the appropriate order.

Dated: March 30, 2004

s/ Stanley S. Brotman

STANLEY S. BROTMAN
UNITED STATES DISTRICT JUDGE

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[2] This determination excludes Plaintiff Kane's Breach of Contract claim against Republic Western Insurance Company in Count III., which is still viable.

[3] The sole remaining claim is Plaintiff Kane's Breach of Contract claim against Defendant Republic Western Insurance Company (part of Count III)

APPENDIX E – ORDER ON MOTIONS FOR SUMMARY JUDGMENT

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

LAUREN KANE, ESQUIRE and MARTIN FEIERSTEIN Plaintiffs, v. U-HAUL INTERNATIONAL, INC.; U-HAUL STORAGE INC.; THREE SAC SELF STORAGE, ITS PARTNERS AND REPRESENTATIVES; REPUBLIC WESTERN INSURANCE COMPANY; DONALD CESARETTI, VICKI CESARETTI; JOHN DOES 1-10 INDIVIDUALS; JOHN DOES 11-20 JOHN DOES 21-30. Defendants.	:	Civil Action No. 01-6002(SSB) ORDER ON MOTIONS FOR SUMMARY JUDGMENT

THIS MATTER having come before the Court on the cross-motions of Plaintiffs Lauren Kane and Martin Feirstein and Defendants Republic Western Insurance Co., U-Haul Southern New Jersey (improperly pleaded as U-Haul International Inc. and U-Haul Storage Inc.), Three Sac Self Storage, Donald Cesaretti and Vicki Cesaretti for summary judgment under Federal Rule of Civil Procedure 56.

The Court having reviewed the record and the submissions of the parties; For the reasons set forth in the Court's opinion of this date; **IT IS** this 30 day of March, 2004 **HEREBY**

ORDERED that Defendants' Motion for Summary Judgment on Plaintiffs;

Negligence claims (Count I, Count IV, Count VI, Count VII, Count IX, Count X, Count XIII) is **GRANTED**; and

IT IS FURTHER ORDERED that Defendants' Motion for Summary Judgment on Plaintiffs' Breach of Contract claims (Count II, Count III) is **GRANTED**[1]; and

IT IS FURTHER ORDERED that Defendants' Motion for Summary Judgment on Plaintiffs' New Jersey Consumer Fraud Act claim (Count XI) is **GRANTED**; and

IT IS FURTHER ORDERED that Defendants' Motion for Summary Judgment on Plaintiffs' intentional misrepresentation claim (Count XII) is **GRANTED**; and

IT IS FURTHER ORDERED that Defendants' Motion for Summary Judgment bad faith claim (Count XV) is **GRANTED**; and

IT IS FURTHER ORDERED that Defendants' Motion for Summary Judgment on Plaintiffs' punitive damages claim (Count XIV) is GRANTED; and

IT IS FURTHER ORDERED that Plaintiffs' Motion for Summary Judgment on Plaintiffs' negligence claims is **DENIED**; and

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[1] This excludes Plaintiff Kane's claim for breach of contract against Republic Western Insurance Company (part of Count III), which is the sole remaining claim in the case.

IT IS FURTHER ORDERED that Plaintiffs' Motion for Summary Judgment on Plaintiffs' New Jersey Consumer Fraud Act claim is **DENIED**; and

IT IS FURTHER ORDERED that Plaintiffs' Motion for Summary Judgment on Plaintiffs' bad faith claim is **DENIED.**

No costs.

Dated: March 30, 2004

s/Stanley S. Brotman
STANLEY S. BROTMAN
UNITED STATES DISTRICT JUDGE

NOT FOR PUBLICATION

APPENDIX F – OPINION ON (1) PLAINTIFFS MOTION FOR RECONSIDERATION

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

LAUREN KANE, ESQUIRE and MARTIN FEIERSTEIN Plaintiffs, v. U-HAUL INTERNATIONAL, INC.; U-HAUL STORAGE INC.; THREE SAC SELF STORAGE, ITS PARTNERS AND REPRESENTATIVES; REPUBLIC WESTERN INSURANCE COMPANY; DONALD CESARETTI, VICKI CESARETTI; JOHN DOES 1-10 INDIVIDUALS; JOHN DOES 11-20 JOHN DOES 21-30. Defendants.	:	Civil Action No. 01-6002(SSB) **OPINION ON (1) PLAINTIFFS' MOTION FOR RECONSIDERATION OF MARCH 30, 2004 ORDER AND (2) DEFENDANT'S CROSS-MOTION FOR RECONSIDERATION**

APPEARANCES:

Lauren H. Kane, Esq.
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BROTMAN, DISTRICT JUDGE.

Presently before the Court is Plaintiffs Lauren Kane, Esq. and Martin Feierstein's Motion for Reargument (treated by the Court as a motion for reconsideration) of the Court's Order and Opinion on Motions for Summary Judgment Dated March 30, 2004 and Defendant Republic Western Insurance Company's Cross-Motion for Reconsideration of the Court's Order and Opinion of March 30, 2004.

I. BACKGROUND.

Defendant insurer, Republic Western Insurance Company, sought permission to deposit its remaining policy limits with the court and was granted permission by an Order dated, July 6, 2004. The sole remaining claim in this case is Plaintiff Kane's Breach of Contract claim against Defendant Republic Western Insurance Company (part of Count III) and the amount of damages. The parties' valuations of the stored items remain far apart and the extent of the damages to the items remains disputed, as well.

Two storage units were rented, one of which was insured and rented by Plaintiff Kane. Pursuant to Plaintiff Kane's letter dated September 17, 2001 and submitted as Exhibit 17 to Plaintiffs' motion for reconsideration, Plaintiff Kane's stored items were valued in the amount of $16,599.00 (Six-

teen Thousand Five Hundred and Ninety-Nine Dollars). The other unit was rented by Plaintiffs Feierstein, but not insured. Plaintiff Feierstein has indicated by letter that the items stored in locker #5216 constituted his claim. (Letter dated Sept. 13, 2001, Ex. 17 to Plaintiffs' motion for reconsideration) (stating "These claims were sent together, but were separated from each other and also individual claim amounts were represented.)

Both rental agreements contained a warning which stated "Warning-Do Not Store the Following," listing things that should not be stored in the units and included "Property with a value over $15,000." The limitation was reiterated on the second page of the agreement which warns customers not to store highly valuable goods in the storage unit, stating, "Warning... Customers agrees not to store property with a total value in excess of $15,000." For the convience of its customers, U-Haul offered insurance up to the full amount of property permitted in the units and the customers in this case were alerted to purchase insurance to protect their property.

Originally, the motion for reconsideration of the Court's March 30, 2004 Order was denied as untimely. Plaintiffs then requested a reconsideration of the Order denying the motion for reconsideration because they needed additional time to obtain the case file from the original lawyer, who terminated the representation. The first attorney retained to represent plaintiffs in this case also resigned. (July 22, 2004, Oral. Arg. Ex. P-3). Now, as an attorney, Plaintiff Kane has assumed representation of both herself and Plaintiff Feirstein. On this basis, the Court vacated its order denying an extension of time, permitting Plaintiffs to file the motion

for reconsideration in the expectation that dispositive evidence might have been discovered which was not presented to the Court. Oppositions and replies on the motion for reconsideration were filed and considered by the Court.

However, the arguments contained in Plaintiffs motion for reconsideration simply disagree with the Court's opinion. No newly-discovered evidence was presented in the pleadings or upon oral argument. No intervening case law was identified in the pleadings or upon oral argument. The Plaintiffs did not argue that the Court overlooked any dispositive matters which had been duly presented. The only basis proffered, upon oral argument, was a generalized need to correct clear error or prevent manifest injustice. On this basis, Plaintiffs seek to reopen the Court's March 30, 2004 Order and Opinion on motions for summary judgment.

II. STANDARD FOR RECONSIDERATION.

The District Court has adopted the language of the Third Circuit that the "purpose of a motion for reconsideration is to correct manifest errors of law or fact, or to present newly discovered evidence." *Harsco Corp. v. Zlotnicki* 779 F.2d 906, 909 (3d Cir. 1985), *cert. denied,* 476 U.S. 1171 (1986). Furthermore, a motion for reconsideration is an extremely limited procedural vehicle and "relief under the rule is granted 'very sparingly.'" *Bowers v. Nat'l Coll. Athletic Ass'n,* 130 F. Supp. 2d 610, 613 (D.N.J. 2001).

Thus, a motion for reconsideration should be based on three possible grounds: (1) intervening change in controlling

law, (2) availability of new evidence, or (3) presentation of matters overlooked in order to correct clear error or prevent manifest injustice *Harsco Corp. v. Zlotnicki*, 779 F.2d 906, 909 (3d Cir. 1985); L.R. Civ.P.7.1(g). *See also, Public Int. Research Group v. Yates Indus.*, 709 F. Supp. 511, 512 n.1 (D.N.J. 1991) (stating that reconsideration and reargument are interchangeable terms.) The reference to matters overlooked limits the motion only to facts and legal arguments which had been properly presented to the court at the time of the original motion. *NL Indus. Inc. v. Commercial Union Ins. Co.*, 935 F. Supp. 513, 516 (D.N.J 1996) ("Reconsideration motions...may not be used to relitigate old matters, or to raise arguments or present evidence that could have been raised prior to the entry of judgment.")

Reconsideration is not a vehicle for registering disagreement with the court's initial decision, for rearguing matters already addressed by the court, or for raising arguments that could have been raised before but were not. Thus, the limited availability of reconsideration promotes a fundamental principal of judicial efficiency by focusing parties on the original pleadings and encouraging "parties to present their positions as completely as possible, and to prevent parties from filing a second motion, with the hindsight provided by the court's analysis, covering issues that should have been raised in the first set of motions." *U.S. v. Jones*, 158 F.R.D. 309, 314 (D.N.J. 1994). In short, *Harsco* affirms the common understanding that reconsideration is an "extraordinary" remedy not to be sought reflexively or used as a substitute for appeal.

Therefore, unsuccessful litigants may not use motions for reconsideration to obtain a "second bite at the apple." *Bhatnagar v. Surrendra Overseas, Ltd.*, 52 F.3d 1220, 1231 (3d Cir. 1995). Nor should a court need to "rethink what it ha[s] already thought through -- rightly or wrongly.'" *Oritani Sav. & Loan Ass'n v. Fidelity & Deposit Co.*, 744 F. Supp. 1311, 1314 (D.N.J. 1990) (quotation omitted), *rev'd on other grounds*, 989 F.2d 635 (3d Cir. 1993).

III. PLAINTIFFS' MOTION FOR RECONSIDERATION

Plaintiffs have failed to present new law, new evidence or anything overlooked by the Court from the motions on summary judgment. However, the Court reviewed the submissions and now will readdress some of the arguments for clarity.

A. Summary Judgment on Negligence.

In the motion for reconsideration, Plaintiffs contend that the standard for summary judgment has not been met without offering any specific basis. At some point later, Plaintiffs indicated that when there is a factual dispute as to defendant's conduct in a negligence case that summary judgment would be inappropriate.

The Court must now reiterate that the Opinion on the summary judgment motions did not reach the issue of negligence because the contracts contained a valid exculpatory clause. Exculpatory clauses have been recognized as valid in New Jersey for many years. *See, e.g., Chem. Bank v. Bailey*, 687 A.2d 316 (N.J. Super. 1997); *Kuzmiak v. Brookchester,*

Inc., 111 A.2d 425 (N.J. Super. 1955)(finding a sufficient public policy concern to strike an exculpatory clause where the legislature chose to regulate residential leases.)

Alternatively, Plaintiffs argued that public policy requires that the Court strike the exculpatory clause because the contract was "renting to consumers." (Oral Arg. At 15, l. 20.) Foremost, as explained in the Opinion, any contracts made between a business and a consumer does not automatically provide sufficient basis for a public policy concern. One exception exists under landlord-tenant law where the legislature has chosen to regulate this field. *Id.* Under certain conditions, residential leases for home occupancy provide a limited exception to the New Jersey rule which otherwise permits parties to contract for liability, such as utilizing exculpatory clauses in their contracts. As explained before, Landlord-tenant concerns do not apply in the case of self-storage, where there is no tenant, nor a fixed lease term.

B. Breach of Contract.

Next, the Court found that the contracts themselves were unambiguous. (March 30, 2004, Ct. Op. 17-20.) Plaintiffs have again argued for their case presented upon summary judgment that *Gonzales* applies. *Gonzales v. A-1 Self-Storage, Inc.*, 795 A.2d 885 (N.J. Super. 2000). However, the Court found the case at bar to be distinguishable from *Gonzales*. (March 30, 2004, Ct. Op. 15-16.)

Under the facts of *Gonzales*, an exculpatory clause was found to be unconscionable because it required the consumer to procure significant insurance coverage while simultaneously depriving a potential insurer the right to sue the storage

company and also because the bargaining power between the parties was unequal. *Id.* At 889. These overwhelming one-sided terms were not found in the Plaintiffs' contracts and the disparity in bargaining power was not as great.

Omitting any references to a basis for reconsideration, Plaintiffs offered further arguments, based upon *Gonzales*, suggesting that the relationship with U-Haul was a bailment. Plaintiffs attempt to show that U-Haul exerted a greater amount of control over the facilities than found in the Opinion, but without distinguishing between common areas and access to the goods in question. As this Court already stated, in the case of self-storage, the unit renter is in the best position to know the value of the property stored in order to properly insure its value. Furthermore, for a bailment to operate properly, parties normally agree as to the value of the goods being held by the bailor in order to properly price a bailment transaction.

Once again, this Court notes that the relationship between the parties was not a bailment.

(March 30, 2004, Ct. Op. 11-13).

C. New Jersey Consumer Fraud Act

Finally, Plaintiffs contend that they have now discovered "new evidence" that defendants are in violation of the Consumer Fraud Act. (Oral Arg. 46, l. 3-4.) These arguments were not presented in Plaintiffs' Brief in support of motion for reconsideration, but were addressed by the Court's original Opinion. (March 30, 2004, Ct. Op. 11-14). Furthermore, any evidence offered was provided along with the original

motions for summary judgment and the statute itself existed before this litigation arose. Lastly, Plaintiffs had the benefit of two lawyers developing their case and one of the Plaintiffs, another lawyer, reviewing the pleadings. The Court will not entertain the attempt to find new causes of action this late in the game.

IV. DEFENDANT'S CROSS-MOTION FOR RE CONSIDERATION

Defendant's Cross Motion for Reconsideration has been rendered moot. Defendant's shall retain the right to refile. As a result, the sole remaining issue in the case is Plaintiff Kane's claim for breach of contract against Defendant Republic Western Insurance Company (part of Count III) for its alleged non-payment of insurance proceeds. Upon Defendant's tender of the remaining policy limits for payment into the Court's Registry pursuant to this Court's Order of July 6, 2004, the breach of contract claim, along with damages and interest, will be addressed.

V. CONCLUSION

Review of the submissions and Plaintiff's motion reveals that the motion for reconsideration was based on disagreement with the Court which is an impermissible use of Rule 7.1(g). *G-69 v. Dengan,* 748 F. Supp. 274, 275 (D.N.J. 1990). In addition, Plaintiffs finding themselves to be unsuccessful litigants, may not now use a motion for reconsideration to obtain a "second bite at the apple." *Bhatnagar v. Surrendra Overseas, Ltd.,* 52 F.3d 1220, 1231 (3d Cir. 1995).

Plaintiffs' motion for reconsideration is not based on an intervening change in controlling law, the availability of new evidence, nor did the motion present matters overlooked in order to correct clear error or prevent manifest injustice. The Court's Opinion and Order of March 30, 2004 remain in full force and effect and Plaintiffs' motion for reconsideration will be denied by Order of this same date.

Defendant's cross-motion for reconsideration shall be denied by Order of this same date.

Summary judgment has been granted, and remains in effect against Plaintiff Feirerstein pursuant to the March 30, 2004 Order and Opinion.

As a result, one sole remaining claim, Plaintiff Kane's Breach of Contract claim against Defendant Republic Western Insurance Company (part of Count III), and a determination on Plaintiff Kane's damages and interest remain to be resolved.

Dated: **August 6, 2004**

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

LAUREN KANE, ESQUIRE and MARTIN FEIERSTEIN Plaintiffs, v. U-HAUL INTERNATIONAL, INC.; U-HAUL STORAGE INC.; THREE SAC SELF STORAGE, ITS PARTNERS AND REPRESENTATIVES; REPUBLIC WESTERN INSURANCE COMPANY; DONALD CESARETTI, VICKI CESARETTI; JOHN DOES 1-10 INDIVIDUALS; JOHN DOES 11-20 JOHN DOES 21-30. Defendants.	:	Civil Action No. 01-6002(SSB) **ORDER DENYING (1) PLAINTIFFS' MOTION FOR RECONSIDERATION OF MARCH 30, 2004 ORDER AND (2) DEFENDANT'S CROSS-MOTION FOR RECONSIDERATION**

THIS MATTER having first come before the Court on the Defendants' Motion and Plaintiffs Cross-Motion for Summary Judgment under Federal Rule of Civil Procedure 56; and the Court having granted Defendant's Motion for Summary Judgment, except one sole remaining claim, Plaintiff Kane's Breach of Contract claim against Defendant Republic Western Insurance Company (part of Count III), by an Opinion and Order filed on March 30, 2004;

THIS MATTER having been revisited by the Court on a motion for reconsideration, filed by Plaintiffs Lauren H. Kane, Esq. and Martin Feierstein pursuant to Local Civil Rule 7.1, and the Court having considered the motion and submissions;

IT APPEARING that Plaintiffs' motion for reconsideration is not based on an intervening change in controlling law, the availability of new evidence, or the need to correct clear error or prevent manifest injustice;

IT APPEARING that Defendant's cross-motion for reconsideration has been rendered moot; and

FOR THE REASONS stated in an Opinion of the Court filed on this same date,

NOW, THEREFORE, it is on this 6th day of August, 2004;

HEREBY ORDERED that Plaintiffs' motion for reconsideration of Court's Order shall be, and is hereby **DENIED** and the Court's Opinion and Order of March 30, 2004 shall remain in full force and effect;

HEREBY ORDERED that Defendant Republic Western Insurance Company's cross-motion for reconsideration shall be, and is herby **DENIED.**

Dated: August 6, 2004

STANLEY S. BROTMAN
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

LAUREN KANE, ESQUIRE and MARTIN FEIERSTEIN	:	
Plaintiffs,	:	Civil Action
v.	:	No. 01-6002(SSB)
U-HAUL INTERNATIONAL, INC.; U-HAUL STORAGE INC.; THREE SAC SELF STORAGE, ITS PARTNERS AND REPRESENTATIVES; REPUBLIC WESTERN INSURANCE COMPANY; DONALD CESARETTI, VICKI CESARETTI; JOHN DOES 1-10 INDIVIDUALS; JOHN DOES 11-20 JOHN DOES 21-30.	:	**ORDER DENYING (1) PLAINTIFFS' MOTION FOR RECONSIDERATION OF AUGUST 6, 2004 ORDER AND (2) DEFENDANT'S CROSS-MOTION FOR RECONSIDERATION**
Defendants.	:	

THIS MATTER having first come before the Court on the Defendants' Motion and Plaintiffs Cross-Motion for Summary Judgment under Federal Rule of Civil Procedure 56; and the Court having granted Defendant's Motion for Summary Judgment by an Opinion and Order filed on March 30, 2004.

THIS MATTER having been revisited by the Court on a motion for reconsideration, filed by Plaintiffs Lauren H. Kane, Esq. and Martin Feierstein pursuant to Local Civil Rule 7.1, and the Court having considered the motion and submission and denying the motion pursuant to an Opinion and Order dated August 6, 2004;

THIS MATTER having now come before the Court on Plaintiffs' Motion for Reconsideration of the Court Order Denying Reconsideration dated August 6, 2004;

THIS MATTER having now having also come before the Court on Defendant Republic Western Insurance Company's letter request seeking to reopen its Cross-Motion for Reconsideration; and the Court having reviewed the submissions and record; and

The Court noting that motions for reconsideration are not a substitute for the appellate process and that relief under the rule permitting reconsideration should be granted sparingly,1

The Court also noting, as the March Opinion and Order stated, there still remains outstanding for determination only part of Count III, Plaintiff Kane's breach of contract claim against Defendant Republic Western Insurance Company for alleged non-payment of insurance proceeds.2 Therefore, remaining to be determined are the amount of damages, up to the policy limits, prejudgment interest,3 if any, and alleged

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1 *Bowers v. NCAA,* 130 F. Supp. 2d 610, 613 (D.N.J. 2001)("Not only are such motions not a substitute for the appellate process, such motions are not an opportunity to argue what could have been, but was not, argued in the original set of moving and responsive papers.")

2 To date, the Defendant has been granted leave to deposit the proceeds with the Court, but has not done so. *C.f. Garrell v. Midwest Constr. Co.*, 619 F.2d 349 (5th Cir. 1980).

3 *See* N.J. R.4:42-11 (2004). *See also Elec. Mobility Corp. v. Bourns Sensors, Inc.*, 87 F. Supp. 2d 394 (D.N.J. 2000)("Under

damages for delay of Defendant insurance company in paying the proceeds of the policy;

IT APPEARING that Plaintiffs' Motion for Reconsideration is not based on an intervening change in controlling law, the availability of new evidence, or the need to correct clear error or prevent the proceeds of the policy;

IT APPEARING that Defendant's cross-motion for reconsideration is not based on an intervening change in controlling law, the availability of new evidence, or the need to correct clear error or prevent manifest injustice;

NOW, THEREFORE, it is on this 18th day of August, 2004;

HEREBY ORDERED that Plaintiffs' motion for reconsideration of Court's Order shall be, and is hereby **DENIED** and the Court's Opinion and Order of March 30, 2004 shall remain in full force and effect; and

FURTHER ORDERED that Defendant Republic Western Insurance Company's cross-motion for reconsideration shall be, and is hereby **DENIED.**

Dated: August 18, 2004

New Jersey law, prejudgment interest may be awarded on contract claims in the discretion of the court and in accordance with equitable principles.")(citations omitted).

APPENDIX G – OPINION, DATED OCTOBER 14, 2005

NOT FOR PUBLICATION

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
CAMDEN VICINAGE

LAUREN KANE, et al.,	:	
Plaintiffs,	:	Civil No. 01-6002 (RBK)
v.	:	**OPINION**
U-HAUL INTERNATIONAL, INC., et al	:	
Defendants.	:	

KUGLER, United States District Judge:

This matter comes before the Court on its own motion pursuant to Federal Rule of Civil Procedure 12(h)(3). For the reasons set forth below, the above captioned case will be dismissed for lack of subject matter jurisdiction.

I. Background

In 1997, Plaintiff Martin S. Feierstein ("Feierstein") entered into an agreement with U-Haul Southern New Jersey ("U-Haul") to rent a storage unit in Pennsauken, New Jersey. Plaintiff Lauren Kane ("Kane") entered into a similar con

tract with U-Haul in 1998. In April 2001, Plaintiffs discovered that the property they put in the storage units was damaged as a result of water leaking into the facility through a roof that needed to be replaced.

The contracts signed by both Feierstein and Kane included exculpatory clauses relieving U-Haul from any liability for negligence. Both agreements also contained offers to provide customers with up to $15,000.00 of insurance coverage if the customer agreed to pay an additional monthly premium. Kane accepted the offer of insurance; Feierstein declined.

Plaintiffs filed suit in the District of New Jersey in December 2001 against Defendants Republic Western Insurance Company ("Republic Western"), U-Haul Southern New Jersey (improperly pleaded as U-Haul International, Inc., and U-Haul Storage, Inc.), Three Sac Self Storage, Donald Ceasaretti, and Vicki Cesaretti (collectively, "Defendants"). On March 30, 2004, the Honorable Stanley S. Brotman granted Defendants' motion of summary judgment on all claims, in part on the basis that the exculpatory clauses in Kane and Feierstein's contracts with U-Haul were valid and applicable under New Jersey Law, relieving U-Haul of any liability. Plaintiffs appealed Judge Brotman's Order, which is presently pending decision before the Third Circuit Court of Appeal. The case was reassigned to the Honorable Robert B. Kugler on August 29, 2005.

Now remaining before the Court is Kane's claim for breach of contract against Republic Western. This is the sole live claim still pending in this suit, and Kane is the sole

plaintiff. Specifically, Kane alleges that Republic Western gave her $500.00 to use for moving expenses, but has tendered no additional money to compensate Kane for her loss. Republic Western does not dispute the validity of Kane's contract for insurance, only the value of the damaged property. On July 6, 2004, Judge Brotman granted Defendant's Motion to Deposit Remaining Policy Limits with the Court pursuant to Federal Rule of Civil Procedure 67, thereby tolling the accrual of prejudgment interest; however, to date, Kane has received only $500.00.

In his Order of March 30, 2004, Judge Brotman determined that Republic Western did not act in bad faith, and that Kane and Feierstein obstructed and delayed Defendants from investigating the claim. After discovering the water damage, Kane met with an insurance adjuster to inspect the units. Kane provided an inventory list approximately three and a half months later, claiming losses of over $120,000.000. Defendants then hired an appraiser to inventory and value the damage; however, it appears that Plaintiffs would not permit Defendants to inspect their property. From October 10, 2001, until November 13, 2002, Defendants made a number of requests for inspection, but Plaintiffs continued to refuse any appraisal.

During a pretrial status conference held before this Court on October 12, 2005, Kane acknowledge that the full amount in controversy is $14,500.00, comprised of the insurance policy limit of $15,000.00, less the $500,00 already tendered to Plaintiff. Kane further conceded that her sole additional claim is for prejudgment interest.

During the status conference, Republic Western offered to stipulate to Kane's loss up to the policy limit of $15,000.00, and pay the remaining $14,500.00, which had already been tendered to the court. Kane refused this offer even though she agreed that she would be unable to recover more than $14,500.00. Republic Western also claims that it had previously offered the remainder of the limit of coverage to Plaintiffs' former attorney, Greg Noonan, who refused the offer.

In a letter to the Court written October 12, 2005, Republic Western stipulated "to Plaintiff Kane's loss of $15,000.00," and further stipulated that "it tendered the full amount of the insurance policy, $15,000.00, to satisfy Plaintiff's claim on the insurance policy."

II. Diversity Jurisdiction

This Court's jurisdiction over the present suit is founded on diversity jurisdiction pursuant to 28 U.S.C. § 1332 (a). Plaintiff and Defendant are citizens of different states and the complaint pleaded an amount in controversy over $75,000.00. Although the amount in controversy is now $14,500.00, and therefore insufficient for diversity jurisdiction, this Court retains jurisdiction because diversity jurisdiction is assessed at the time the action is filed, and "if jurisdiction exists at the time an action is commence, such jurisdiction may not be divested by subsequent events." Freeport-McMoRan, Inc. v. K.N. Energy, Inc., 498 U.S. 426, 428 (1991).

III. DISCUSSION

Article III of the United States Constitution limits the federal judicial power to actual cases and controversies. Liner v. Jafco, Inc., 375 U.S. 301, 306 n.3 (1964). "When the issues presented in a case are no longer 'live' or the parties lack a legally cognizable interest in the outcome, the case becomes moot and the court no longer has subject matter jurisdiction." County of Los Angeles v. Davis, 440 U.S. 625, 631 (1979); Powell v. McCormack, 395 U.S. 486, 496 (1969).

Where a defendant has offered the plaintiff the full amount that the plaintiff could recover, the case becomes moot for lack of a case or controversy. Weiss v. Regal Collections, 385 F.3d 337, 340 (3d Cir.2004) ("An offer of complete relief will generally moot the plaintiff's claim, as at the point the plaintiff retains no personal interest in the outcome of the litigation.") (citing Rand v. Monsanto Co., 926 F.2d at 596, 598 (7th Cir. 1991) ("Once the defendant offers to satisfy the plaintiff's entire demand, there is no dispute over which to litigate.")). The case becomes moot even if the plaintiff refuses to accept the defendant's offer. Rand, 926 F.2d at 598 ("A plaintiff who refuses to acknowledge this loses outright, under Fed.R.Civ.P.12 (b)(1), because he has no remaining stake.").

Because "federal courts do not sit simply to bestow vindication in a vacuum," a federal court is required to dismiss a suit for lack of jurisdiction once a defendant has made an offer of complete relief. Zimmerman v. Bell, 800 F.2d 386, 390 (4th Cir. 1986) (holding that there is no case or controversy where "defendants had offered [plaintiff] the full amount of damages ($3,281.25) to which she claimed indi-

vidually to be entitled."); see also Abrams v. Interco Inc., 719 F.2d 23, 32 (2d Cir.1983).

During the status conference of October 12, 2005, Republic Western offered to pay Kane $14,500.00, the full amount in controversy. Since this was an offer of complete relief, no case or controversy remains and this Court lacks jurisdiction over the suit. Accordingly, this Court must dismiss the case for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12 (h) (3) ("Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall issue today.

Dated: 10-14-2005 /s/Robert B. Kugler
ROBERT B. KUGLER
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
CAMDEN VICINAGE

LAUREN KANE, et al.,	:	
Plaintiffs,	:	Civil No. 01-6002 (RBK)
	:	**ORDER**
v.	:	
U-HAUL INTERNATIONAL, INC., et al	:	
Defendants.	:	

THIS MATTER having come before the Court on its own motion; and for the reasons expressed in the Opinion issued this date;

IT IS HEARBY ORDERED that the remaining claim of Lauren Kane against Republic Western Insurance Company is dismissed for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(h)(3).

IT IS FURTHER ORDERED that Defendant's Motion to Dismiss Plaintiff's Complaint [Docket No. 194] and Plaintiff's Motion for Sanctions [Docket No. 200] are hereby dismissed as moot.

Dated: 10-14-2005 /s/Robert B. Kugler
ROBERT B. KUGLER
United States District Judge